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In the Supreme Court of the United States

October Term, 1997

ROBIN SMITH,
Petitioner,

v.

OREGON STATE BAR,
Respondent.

Petition For Writ of Certiorari
To the Oregon Supreme Court

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED FOR REVIEW

Roughly two decades ago, this court began to strike down a number of practices that had long operated to restrict competition within the legal profession. Bans on advertising by lawyers (Bates v. Arizona State Bar (1977) 433 US 350) minimum fee schedules (Goldfarb v. Virginia State Bar (1975) 421 U.S. 773), limits on solicitation by lawyers for public interest cases (In re Primus (1978), 436 U.S. 412) and residence requirements to practice within a state's courts (Supreme Court of New Hampshire v. Piper (1985) 470 U.S. 274) have all been ruled to be unconstitutional restraints. Petitioner asks this court to take the next step in dealing with barriers to competition and access to the courts previously erected by the legal profession --to decide what limits, if any, a state may place on the dissemination of legal information by non-lawyers to members of the public.

Petitioner Robin Smith, through her then existing business called People's Paralegal Service, Inc., served over 9000 primarily low income customers between the years of 1987 and 1995. In 1995 the Oregon State Bar obtained an injunction against Petitioner on the grounds she was engaged in the unauthorized practice of law, which effectively caused Petitioner to shut her business down. The trial court made 173 findings of fact, including these:

- A significant number of people cannot afford legal services in this state and some of their legal needs are not being met by the members of the Oregon State Bar. (Finding 172, App D).

- Defendant Smith shares her knowledge of the law and of legal procedures with her customers. (Finding 140, App D)

QUESTIONS PRESENTED FOR REVIEW-Continued

- No non-lawyer has ever filed a complaint of UPL with the Oregon State Bar against Defendants (Finding 171, App D).

These findings, and the fact that Petitioner has been prohibited from in any way sharing her knowledge of the law and of legal procedures with her customers, fairly give rise to the following constitutional questions:

1) Does the Oregon law governing the unauthorized practice of law violate the free speech provision of the First and Fourteenth Amendments to the U.S. Constitution as applied to Petitioner Robin Smith?

2) Does the Oregon law governing the unauthorized practice of law facially violate the free speech provision of the First and Fourteenth Amendments to the U.S. Constitution on the ground that the law is vague and overbroad?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this proceeding. In the proceedings below, People's Paralegal Service, Inc, an Oregon corporation, was also a party with Robin Smith. The corporation no longer exists.

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DECISIONS BELOW

The decision of the Oregon Supreme Court denying review was entered on October 7, 1997, (SC N. S44532) and is reproduced as Appendix A. The decision by the Oregon Court of Appeal was entered on July 9, 1997, (CA A89206).

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. Sec. 1257 (a) and Supreme Court Rule 10.1 (c).

CONSTITUIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal constitutional provisions at issue in this matter are the First and Fourteenth Amendments to the United States Constitution. The First Amendment provides that: "Congress shall make no law respecting an proper establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law..."

Oregon Revised Statute 9.160 provides: "Except for the right reserved to litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar."

ORS 9.166 provides: "(1) If the [Board of

Governors of the Oregon State Bar has reason to believe that a person is practicing law without a license, the board may maintain a suit for injunctive relief in the name of the Oregon State Bar against any person violating ORS 9.160. The court shall enjoin any person violating ORS 9.160 from practicing law without a license.

STATEMENT OF THE CASE

From 1987 until 1995, Petitioner Robin Smith, a non-lawyer, operated a business providing certain law-related services for a fee. Previous to opening her business, Petitioner had obtained a legal assistant Associate Arts Degree, worked in a law firm for one year and apprenticed for three years with an existing legal forms preparation business. During the time that Petitioner was in business, she served in excess of 9000 customers without a complaint. From the time it became available to her in 1992, Petitioner carried errors and omissions insurance. No claims were made against her insurance policy.

The customers primarily served by Petitioner were average American working class consumers wanting help with their uncontested divorce, guardianship, name change, stepparent adoption, bankruptcy, power of attorney, health care form or will (Finding 133 App D). Many of Petitioner's customers earned in the neighborhood of the minimum wage and could not afford to hire an attorney.

Petitioner's services consisted primarily of: providing her customers with various legal forms made available to the public by a variety of sources (Finding 11, App D), answering procedural questions regarding the use of the forms and how the case would progress, and typing the forms under the direction of the customer.

On occasion Petitioner provided non-controversial substantive answers to common legal questions such as how the Oregon courts deal with child custody and what circumstances justify a guardianship?

As all times, Petitioner made it clear to her customers that she was not an attorney and could not practice law. In addition to signs to this effect posted around her office, Petitioner's intake sheets signed by the consumers included the following statement in capital letters:

"We are not attorneys. We are legal technicians. Our service provides preparation of the papers including typing, notary service, and procedural information*** If you require legal advice please see an attorney." (Finding 7, AppD).

In 1991, Petitioner founded the Oregon Legal Technicians Association (OLTA). The purpose of the organization was to lobby the Oregon legislature to implement a licensing scheme for the type of activities engaged in by Petitioner and others. Petitioner was a vocal and open proponent for this cause, and for change to ORS 9.160 that would permit Petitioner and others to offer their document preparation services to the public without violating the law. (Finding 15, App D). Petitioner's efforts were opposed by the Oregon State Bar and were unsuccessful.

In January 1992, the Oregon State Bar began to investigate the possibility of suing Petitioner for the unauthorized practice of law (UPL). After more than three years of indecision, the Oregon State Bar in 1995 filed an action for injunctive relief under ORS 9.166, alleging that

Petitioner was engaged in the unlawful practice of law under ORS 9.160. (Findings 31-47, App D).

After notice and hearing, the Circuit Court for the County of Washington (trial court) entered Findings of Fact and Conclusions of Law supporting its decision that Petitioner had engaged in the unauthorized practice of law (App D). The court entered an injunction on June 14, 1995 prohibiting Petitioner from engaging in a wide variety of activities deemed by the court to constitute UPL (App E). Specifically, the injunction prohibited Petitioner from:

1) any personal contact with any persons in the nature of consultation, explanation, recommendation, or advice regarding their legal matters

2) meeting with any persons to discuss their individual facts and circumstances relating to their need or desire for legal forms, legal services or legal assistance.

3) obtaining information orally, in writing, or in any other manner relating to individual facts and circumstances so as to assist any persons with their legal matters.

4) advising any persons regarding their eligibility for or advisability of legal remedies to address any person's particular legal matters

5) advising any persons regarding procedural functions of the court system as it relates to any person's particular legal matters including advice regarding jurisdiction or venue.

6) assisting in selecting particular forms, documents or pleadings for any persons to address their legal matters.

7) assisting in any way with the preparation or filling out of legal forms, or any parts of such forms, documents or pleadings for any persons.

8) assisting, suggesting or advising any persons how forms, documents or pleadings should be used to address or to solve particular legal problems (App E).

Petitioner appealed to the Oregon Court of Appeals. In an opinion filed July 9, 1997, the Court of Appeal s affirmed the injunction issued by the trial court. (App C). On September 10, 1997, Petitioners filed a Petition for Review with the Oregon Supreme Court (App F). On October 7, 1997 without opinion, the Oregon Supreme Court rejected the review. (App A).

HOW QUESTIONS FOR REVIEW WERE RAISED IN THE OREGON COURTS

Petitioner sought review of the questions presented for review in this Petition in the following ways:

- In the trial court, in her response to the Respondent's Petition for Injunctive Relief, the Petitioner raised the free speech provision of the First Amendment as an affirmative defense. (App H, 274).

- In the trial court, in a motion for a directed verdict, Petitioner raised the first amendment free speech issue in the following manner:

" Second motion for directed verdict, Your Honor, goes to one of our affirmative defenses. It's the freedom of speech issues that we've raised by our affirmative defense, both under the United States Constitution and under the First Amendment....." App H, 274)

"The problem is: What is the practice of law? And I think the statute is overly broad, and it fails because it encompasses and sweeps in First Amendment rights. And for both those reasons, we would move the Court for a directed verdict." (App H, 279).

The trial court refused to issue a directed verdict. And in its Conclusion of Law #5, the trial court stated that: "The law's restrictions upon Defendant's business activities, to the extent they may affect Defendants' speech, are not broader than necessary to serve the interest of the public, and an injunction prohibiting Defendants from engaging in the practice of law will not violate Defendants' rights of free speech as guaranteed by the First Amendment of the United States Constitution...." (App D)

In her *Appellants' Brief and Abstract of Record* filed in the Oregon Court of Appeals, Petitioner presented the following question on Appeal: "Whether the injunction decreed by the trial court is unconstitutionally overbroad and invalid under the Due Process guarantees of the Fourteenth Amendment and First Amendment of the United States Constitution." (App G,1)

In Section B of her *Appellant's Brief*, Petitioner argued that "the trial court's injunction violates Ms. Smith's rights to free speech and association guaranteed by the First Amendment and Fourteenth Amendments to the United States Constitution. as well as by the Oregon Constitution." (App G) Petitioner went on to argue (pg 19 of the brief):

"State and federally sanctioned legal advice is educational speech and cannot be banned absent a compelling state interest and means narrowly tailored to further the state's interest while protecting the speakers right

to speak freely. Board of Trustees, State University of N.Y. v. Fox, 492 U.S. 469, 482 (1989)."

In its opinion affirming the trial court's injunction, the Oregon Court of Appeal rejected Petitioner's First Amendment argument as follows:

"That argument fails. As we have explained, the injunction does not ban speech qua speech; it restrains speech in the context of a putatively professional relationship. As significantly, defendants have not demonstrated that they actually engage in practices within the supposed areas of overbreadth. (fn) Finally, and in all events, defendants argument assumes, without apt authority or analysis, that the First Amendment somehow generally preempts state law-based restraints on unauthorized legal practice of law." (App C, 27).

In her Petition for Review in the Supreme Court of Oregon, Petitioner presented the following question for review:

"1. Whether the injunction decreed by the trial court is unconstitutionally overbroad in banning petitioners not only from statutorily unauthorized practice of law but also from all those forms of practice of law permitted by the state to all non-lawyer citizens of Oregon." (App F,1)

In her Petition for Review, Petitioner went on to state that "[T]he injunction's inclusion within its ban those forms of law practice which the state authorizes non-lawyers to practice violates federal First Amendment guarantees in that there is no compelling interest in the state's banning petitioners from the practice of law which the state authorizes non-lawyers to practice." (App F) Petitioner also stated in her Petition for Review that "Legal

advice is fully protected speech under the First Amendment to the United States Constitution. As such it cannot be intruded upon absent a compelling government interest."

On October 7, 1997, the Oregon Supreme Court denied review without comment. (App A)

REASONS FOR GRANTING THE WRIT

I. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT:, TO WHAT EXTENT UNDER THE FIRST AMENDMENT CAN STATE UNAUTHORIZED PRACTICE LAWS PREVENT NON-LAWYERS FROM ORALLY DISSEMINATING LEGAL INFORMATION TO MEMBERS OF THE PUBLIC

This case is about a non-lawyer providing law-related services directly to the public. This type of activity has a long history. To quote from the American Bar Association's 1995 report *NonLawyer Activity in Law-Related Situations*:

"From the founding of the colonies until today, non-lawyers have participated with lawyers in the giving of advice and assistance to others on matters involving the law. The role of non-lawyers in the process waxed and waned until the eve of the 20th century. Then, in a span of about 70 years, requirements for admission to practice law became more rigorous and laws prohibiting the unauthorized practice of law (UPL) were enacted. The 1930s began several decades of aggressive enforcement of UPL laws. The last 20 years have seen a gradual decline of enforcement, although increased activity by prosecutors or state bar UPL committees has occurred in several jurisdictions in the last few years."

Also during the last 20 years, the modern self-help law movement was born. In 1967, in New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (App.Div.), *rev'd on the dissenting opinion, 287 N.Y.S.2d 422*, the New York Court of Appeals held that the publication and distribution of self-help law materials, including forms and instructions for filling them in, was constitutionally protected activity under the First Amendment and was not subject to the New York UPL laws. By the mid 1970s to early 1980s, self-help law books began to appear in regular bookstores, especially in the Western states.

As the number and sales of self-help law publications increased, so too did the demand for providers of clerical services familiar with the procedures and requirements specific to such areas as divorce and bankruptcy. As with so many other trends, this one was initially centered in California, but by the 1980s, self-representation based on the information in published materials and coupled with form preparation by non-lawyer clerical services became a popular option throughout most of the Western states, and Florida.

It should be noted that both self-help publications and the supportive clerical services almost never were directed towards contested cases that required advocacy in a court of law. Rather, the self-help law movement was almost always restricted to situations where the court was acting in an essentially administrative role processing of paperwork in an uncontested context.

In the early 1980s, the American Bar Association first started talking about a legal access gap. It estimated that at least 100 million Americans lacked adequate access to the courts, often because they lacked affordable legal services. The American Bar Association's Special Committee on the

Delivery of Legal Services began studying self-help law in earnest, selecting Arizona as its primary study site. It first published a report on self-representation in Arizona in the legal areas of divorce and bankruptcy (Cox, *Self-Help Law: Its Many Perspectives*, ABA, 1984). This report found self-representation to be an acceptable option for those who engaged in it. In 1993 the same ABA Committee (now named the Standing Committee on the Delivery of Legal Services) focused its attention on the Maricopa County family court (Phoenix). The Committee's report (Sales, *Self-Representation in Divorce Cases*, ABA, 1993) disclosed that over 50% of the divorces were being handled without lawyers on either side and that only about 10% had lawyers on both sides. These numbers were fairly typical of those found in other Western states.

As self-help divorces grew in number, so did the number of businesses specializing in typing, serving and filing divorce papers. These businesses operated in a number of different ways. Many of them simply assumed the role of scriveners, typing forms under the direction and control of the customer, who got his or her information about which forms to use and what to put in them from a relevant self-help publication. In some cases the form preparation service also sold the publication while in others customers were referred to the local book store. This basic service delivery model remains the most prevalent as of 1998.

But many form preparation services have gone beyond the scrivener role and are willing to answer incidental and basic questions about how a particular legal process works and what information needs to go in the forms. Still, the main thrust of these businesses is typing, filing and serving legal papers for people who have chosen to represent themselves, and not the provision of legal expertise. This model most closely describes Petitioner's activities.

Concomitant with the growth of legal form preparation services alternatively referred to as independent paralegals and legal technicians has been the fitful efforts of state bar associations to either study them (cf State Bar of California, *Report of the Public Protection Committee*,1988) or drive them out of business on the ground that they are engaged in the unauthorized practice of law. All states except Arizona have laws against the unauthorized practice of law, and about two out of three states make UPL a crime.

The primary rationale advanced for UPL laws by the courts, bar associations and legislatures has been consumer protection. However, there has never been any meat on these bones. In a seminal study of UPL enforcement, Deborah Rhode discovered that virtually all UPL enforcement was based on complaints by lawyers rather than consumers, and that consumer harm was virtually absent from all previously filed UPL cases. Rhode, *Authorized Practice*, Vol. 34:1, Stanford Law Review

In 1992, the American Bar Association launched a massive three year national study of non-lawyer legal service providers. In its 1995 report titled *NonLawyer Activity in Law Related Situations*, the 16 member ABA Commission on NonLawyer Practice found that legal technicians were both pervasive, especially in the West, and almost entirely unregulated. The report cited anecdotal evidence that some legal technicians had caused harm by imparting erroneous legal information to their customers primarily in immigration cases. However, the various formal surveys and eight public hearings conducted as part of the Commission's study failed to produce any real evidence of harm.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH THE FREE SPEECH PROVISIONS OF THE FIRST AMENDMENT BECAUSE IT BARS PETITIONER FROM ENGAGING IN FULLY PROTECTED SPEECH

A. How Oregon Defines the Unauthorized Practice of Law

This petition is being filed because Petitioner, a non-lawyer, was found to have engaged in the unauthorized practice of law and was subjected to injunctive relief and ordered to pay an attorney's fees award of $16,000 (attorney expenses on appeal. As is true in many state, the state of Oregon's legislature does not define the "practice of law." Rather ORS 9.166 provides that anyone not a lawyer who is practicing law can be enjoined from doing so. UPL is not a crime in Oregon.

If there is no statutory definition of "practice of law," how can a non-lawyer know whether he or she is engaged in the practice of law? Again as is true in most state, the definition of UPL is crafted by the Oregon Courts on a case by case basis. This means that to know whether a particular activity will or will not be considered the unauthorized practice of law, the non-lawyer must: Become familiar with the existing case law, and be able to predict how this case law will impact on his or her proposed activities.

Unlike any other area of law, a prospective legal form preparation service is foreclosed from obtaining reliable legal advice on this issue from the local lawyer community, due to the inherent conflict of interest between lawyers and non-lawyers who would offer consumers an alternative to lawyers. Assuming, however, the ability of a particular lawyer to overcome this conflict of interest, the lawyer will

inevitably be forced to issue an opinion that almost any proposed activity would constitute UPL. This stems from the extreme broadness of UPL as defined by the Oregon courts and from the fact that all attorneys are ethically constrained by their professional responsibility rules from assisting another to engage in UPL.

The governing case law in Oregon is Oregon State Bar v. Gilchrist, 272 Or 552, 538 P.2d 913 (1975). This case decided two questions:

- Is it the unauthorized practice of law to disseminate published legal materials?

-Is it the unauthorized practice of law to communicate with the purchasers of those materials for the purpose of helping them prepare court documents?

The court decided the first question in the negative on the basis of New York County Lawyers' Ass'n v. Dacey, 283 N.Y.S.2d 984 (App.Div.), *rev'd on the dissenting opinion, 287 N.Y.S.2d 422* (1967). However, the court answered the second question in the affirmative, as follows:

> "All personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems does constitute the practice of law and must be and is strictly enjoined."

As Gilchrist is the last judicial word on this subject in Oregon prior to the instant case this paragraph defines the unauthorized practice of law in Oregon as it pertains to

legal form preparation services at all times relevant to this case.

It should be noted that Oregon's UPL law, like most state UPL laws, does not depend on whether UPL resulted from business or non-profit activity. Although the instant case involves a business, the same law that was applied to Petitioner could equally be applied, for example, to a battered woman's shelter that counseled its clients for free on how to obtain a temporary restraining order.

B. The Injunction Issued in this Case Is Not Inconsistent With the Gilchrist case.

Earlier, the verbatim terms of the injunction issued against Petitioner were set out in the Statement of the case.

This injunction is logically supported by the Gilchrist language, which among other things prohibits "personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems" (emphasis added).

While denying Petitioner's Motion for Directed Verdict from the bench, the trial judge demonstrated just how broad the Gilchrist case really is:

> The Court: "The difficulty that you get into in certain situations, whether you're the legislature or whether you're the Supreme Court or you're the Ninth Circuit or you're the Court of Appeals or you're a Circuit Court judge, is there are those things and the one that we all hear about is pornography that you know it

> when you see it, but you can't put it in words. And brighter people than I have had that particular problem. The practice of law, like pornography, has that same kind of problem, especially when you get out towards the periphery." (App H)

Comparing the practice of law with pornography in terms of its vagueness is apt. But it offends common sense to suggest that the same "know it when you see it" rule can be used both to decide when UPL has occurred and when particular materials are pornographic. The analogy would be germane if licensed pornographers were given the function of initially determining what was pornographic and barring others from producing it in competition with themselves. And if pornography is protected when it serves a serious artistic purpose, what can be said about legal information which serves the fundamental right of accessing a branch of government and gaining basic legal entitlements.?

C. The Oregon UPL Law as Applied to Petitioner Violates the Free Speech Provision of the First and Fourteenth Amendments

1. Petitioner Concedes the Legal Profession Is Subject to State Regulation

This court has long upheld the right of a state to regulate the legal profession. Goldfarb v. Virginia State Bar, 421 .S. 773 (1975), Bates v. State Bar of Arizona, 433 U.S. 350 (1977). Although this court has previously struck down anti competitive practices, it has always upheld the concept of occupational licensing as such.

Importantly, Petitioner is not challenging a state's right to regulate the legal profession. Rather, Petitioner is raising the question of how far the legal profession's monopoly over

legal information can constitutionally extend. Under Gilchrist (and in the injunction issued against Petitioner), the legal profession's monopoly has been extended, in effect, to any oral interchange between a non-lawyer and a customer regarding the customer's need to use the Oregon courts. Petitioner argues here that this extension of the lawyer monopoly is far beyond what the First Amendment permits.

2. The House of Practice of Law Has Many Mansions

In Chapter 5 of his well regarded book *American Lawyers* (Oxford University Press, 1989), UCLA law professor Richard L. Abel, traces the history of how lawyers came to define their monopoly and defend its boundaries against lay competitors. He points out that until 1870 the legal profession was primarily concerned with its exclusive right to represent people in court. Then the profession turned its attention to out-of-court "incursions" by title insurance companies, credit and collection agencies, banks and trust companies, accountants, automobile clubs, mortgage and insurance companies and lay representatives seeking to appear before administrative agencies. Both the ABA and state bar associations encouraged restrictive legislation over these out-of-court activities, and to a large extent succeeded in either pushing them under the UPL umbrella or addressing them in "treaties" with organizations representing these other groups that clearly delineated the scope of permissible activities. Most of these treaties were abrogated when the very concept came under review of the U.S. Attorney General's antitrust division in the late 1970s.

In large part because of these monopoly building activities, state statutes and UPL case law consigns in all of the following to be the practice of law: 1) representing people in contested court cases as an advocate 2) advising people as to what decisions to make in a court case 3) advising

people as to what decisions to make in a non-judicial matter (such as estate planning) 4) representing people in their dealings with court clerks in uncontested situations (as an intermediary) 5) explaining to people what going to court might accomplish for them 6) explaining to people what a particular court process entails 7) drafting complex transactional forms and court pleadings 8) drafting simple pleadings in uncontested cases 9) helping people to complete check the box fill in the blanks forms that are far less complex than those required to file your taxes or apply for social security or welfare benefits 10) explaining how official court forms are used, and 11) defining technical terms that people need to understand in order to handle their own legal affairs.

The fact is, virtually all law-related information targeted to an individual's situation is off limits to anyone but a lawyer. Bar associations have consistently maintained that explaining law-related matters to people is the same as giving them advice. No UPL case has ever distinguished between disseminating legal information and giving legal advice.

Petitioner does not seek a ruling permitting her to engage in all of these roles. She recognizes that states have an interest in assuring that consumers aren't harmed by errant advice or information that may deeply impact their legal rights. For that very reason, Petitioner dedicated herself in 1991 to working with the Oregon legislature to examine these and other roles and come up with a regulatory scheme that would sensibly permit some of them to be engaged in by non-lawyers under appropriate regulations while reserving others to members of the Oregon Bar. Petitioner does not want to be a lawyer. But Petitioner wants to be able to help the large number of Oregonians who simply can't afford a

lawyer and who are willing to handle their own cases with Petitioner's help.

3. Legal Advice is Fully Protected Speech Under the First and Fourteenth Amendments

In Board of Trustees, State Univ of N.Y. v. Fox, 492 U.S. 469 (1989, this court noted that "legal advice" is fully protected speech. At issue in Fox was a free speech challenge to a public university's rule essentially banning from the dormitories anyone whose motive in entering was to make a profit. The court first pointed out that the ban implicated non-commercial as well as commercial speech in that it would ban a student from receiving medical or legal advice in his or her dorm room (492 U.S. at 482). The court then cited N.Y. Times v. Sullivan for the proposition that legal advice is non-commercial speech even if it is delivered for a fee:

While these examples consist of speech for a profit, they do not consist of speech that *proposes* (emphasis in original) a commercial transaction, which is what defines commercial speech, see Virginia Pharmacy Board, 425 U.S. at 761(collecting cases). Some of our most valued forms of fully protected speech are uttered for a profit. See, e.g., New York Times Co. v. Sullivan, 492 U. S. at 482.

In his dissent from the majority decision remanding the case, Justice Blackmun noted:

"As the majority correctly observes, the resolution so interpreted prohibits not only commercial speech (i.e., speech proposing a commercial transaction), but also a wide range of speech that receives the fullest protection of the First Amendment , 492 U.S. at 482.

4. The Activities Enjoined by the Oregon Trial Court Are Fully Protected Speech

If legal advice is fully protected speech, so are the activities enjoined by the trial court in this case. There is no issue of unauthorized legal representation here. Petitioner did not undertake to represent her customers in or out or court, nor to act as their fiduciary. Nor did she hold herself out as a lawyer or as a legal expert. Petitioner's only pure conduct was typing legal forms. All of her other activities held to constitute UPL and barred by the injunction had to do with communicating legal information of a primarily procedural nature that is, information about how the law works in certain types of cases such as divorce and guardianship and about how to use the Oregon judicial system which is, after all, a branch of the Oregon government. Specifically, Petitioner answered such questions as: How long do I have to live in Oregon to file for divorce? How long does a divorce take? I haven't seen my spouse for 2 years. How w do I divorce him? Does my spouse need to sign the papers? Do I need to notify the Children's Services Division when I file for an adoption? Where do I file a bankruptcy? How many copies of the forms will I need? What is a codicil? Does a Power of Attorney have to be notarized? How many witnesses will I need for my will? Is there a court hearing for a name change?

Under traditional First Amendment analysis, fully protected speech remains fully protected no matter who engages in it. For instance, legal advice, which is fully protected speech when uttered by lawyers (Cf State University of New York v. Fox) should not become less protected simply because it is uttered by non-lawyers. Rather, to the extent that a state has a compelling interest in regulating the content of legal advice or legal information uttered by a non-lawyer, this interest must be advanced through a constitutionally

permissible system of regulation instead of by barring the speech altogether except when a lawyer utters it.

5. Oregon Must Have A Compelling State Interest in Banning All People But Lawyers From Engaging In Fully Protected Speech

Once a type of speech is determined to be fully protected under the First Amendment, prohibiting a person from engaging in that speech is presumptively unconstitutional. The prohibition may only be upheld if the state offers a "compelling state interest" for the regulation. NAACP v. Button, 371 U.S. 415 (1963). Because no court has ever ruled that legal information or legal advice offered by a non-lawyer is fully protected speech under the First Amendment, no court has ever had to rule on the question of whether states have a compelling state interest in maintaining their UPL laws.

The almost universal rationale advanced for UPL laws by the courts that have enforced them is the need to protect consumers against receiving erroneous legal information or advice. But several comprehensive academic studies have reported the virtual absence of any evidence that consumers are harmed by non-lawyers assisting people in uncontested matters, and Petitioner is unaware of any studies that establish the existence of such harm. See eg, Rhode, *Authorized Practice*, Vol. 34:1, Stanford Law Review; Christensen, *The Unauthorized Practice of Law; Do Good Fences Really Make Good Neighbors Even Good Sense?;* American Bar Foundation Research Journal (Spring 1980); ABA Commission on NonLawyer Practice, *NonLawyer Activity in Law-Related Situations* (1995).

The state of Oregon undoubtedly will argue that consumer protection is a compelling state interest justifying banning

the Petitioner and other non-lawyers from transmitting legal information to their customers. However, the fact that a huge legal access gap exists for many millions of Americans (the ABA has estimated that in excess of 100 millions Americans have unmet legal needs because of how the legal system is structured) makes an equally strong argument that UPL laws cause far more consumer harm than they prevent.

In Edenfield v. Fane 507 U.S. 761 (1993), a commercial speech case, this court invalidated an occupational restriction on solicitations by licensed accountants. In response to the state's argument regarding its interests in the regulation, this court noted that the states:

> "burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real, and that its restriction will in fact alleviate them to a material degree."

Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression (507 U.S. at 771).

The State of Oregon has no studies justifying its claimed interests (in fact, all pertinent studies in other states draw the opposite conclusion). It is true that the trial court concluded in a "discussion" following its "Findings and Conclusions" that Petitioner "has done great harm to some of her customers." (App D). However, this statement is not supported by the Findings of Fact,

Assuming that the speech in question here is held by this court to be fully protected under the First Amendment, the

State of Oregon will have the even greater "compelling interest" burden to justify the absolute ban on the dissemination of legal information by non-lawyers.

6. Assuming Oregon has a Compelling Interest in Regulating the Dissemination of Legal Information by Non-lawyers, UPL is Not A Narrowly Tailored Method of Serving That Interest

Under the Oregon UPL laws as applied to Petitioner, Petitioner may not personally offer any substantive or procedural information to her clients regarding an Oregon divorce. In this regard, Oregon's UPL laws are typical of those in other states, which often prohibit non-lawyers from providing any information about how to access and use the courts. Put another way, under these laws only lawyers (and those under their direct control and supervision)are authorized to disseminate legal information to the public in a one-on-one context.

For people undertaking to represent themselves, these UPL rules mean that they must obtain all their information from books or from lawyers. What this means in practice is that people who have sub-par reading or language skills and who also cannot afford lawyers are completely deprived of access to the courts, often for the lack of supportive information that is routine and trivial. Many of these are surely the very same people who the ABA in its various "legal needs" studies has found to be underserved by our current legal system. Imagine the barriers a self helper faces when none but a lawyer can answer questions like the ones listed earlier in Section C.4.

Assuming, then, that legal information or legal advice is fully protected speech, and further assuming that the State of Oregon is found to have a compelling interest in

regulating that speech by non-lawyers, the final question to address is whether the Oregon UPL laws are narrowly tailored to satisfy that compelling state interest.

We start with the fact that no U.S. Supreme Court case has, after first identifying speech as fully protected, acquiesced in a regulatory system that forbade that speech to all but a handful of individuals who were licensed by the government to engage in it. But this is precisely how UPL laws operate. They forbid everyone except licensed lawyers from imparting information about the law and about how to use and access a branch of government. In this respect, current UPL laws achieve the exact opposite of narrow tailoring. In fact UPL laws are specifically tailored to have all the subtlety of a blunderbuss. That this is no exaggeration can be seen from the fact that Oregon makes no effort to statutorily define UPL but rather leaves it to be defined by the courts on a case by case basis.

In many ways the instant case is like the situation in Airport Commissioners v. Jews For Jesus, 482 U.S. 569 (1987). There, an airport regulation banned "all First Amendment activities" in the central terminal. In ruling that the regulation on its face violated the First Amendment, this court stated: " We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech." [482 U.S. 574-575]"

In addition to preventing many types of people from engaging in self-representation, the locking up of legal information in the hands of a small government-sanctioned group of lawyers has certainly helped to make us into a society of legal illiterates. Information is the lifeblood of a democracy, especially information about how to access and use the government itself, whatever the branch. The freer

such information flows, the better the democracy works. Blockages in the information pipeline, on the other hand, tend to unfairly concentrate power in the hands of the privileged. This is the exact rationale that the U.S. Supreme Court used in the commercial speech case of Bates v. State Bar of Arizona, 433 US 350 (1977) to strike down blanket bans on lawyer advertising. And like the ban on advertising struck down in Bates, UPL restrictions have been a vital part of the legal profession's efforts to define and maintain its monopoly. That is, they were intentionally set up to prevent competition; the consumer protection justification came later. (American Lawyers, Abel, Oxford University Press). The case against UPL laws that throw an all-encompassing blanket over fully protected speech such as the dissemination of legal information is even more compelling than in the case of the commercial speech addressed in Bates.

Professional licensing has long been a mainstay of the American regulatory landscape and it may seem, on the face of it, as inherently reasonable to regulate the legal profession as any other. And since regulation always implies a border between who is authorized to practice the profession and who is not, it seems reasonable to punish people who illegally cross this border, however it is defined. As the Oregon Court of Appeals put it, "[T]he practice of law involves conduct, processes, and relationships that transcend mere expression. In that respect, ORS 9.160 and the corollary legal licensing statutes are no different from other professional licensing and regulatory schemes." (App C)

The problem with this rationale is that the legal profession really is like no other. A major portion of its stock in trade is information about how to access and use a branch of government, a commodity vital to exercising the rights of

citizens. While an argument can be made that courts have historically had the right to decide who serves as an intermediary between a party and the court, this argument cannot constitutionally be extended to the dissemination of legal information about how to access the courts. This is not to say that laws protecting consumers against the consequences of bad legal information and advice aren't appropriate. But consumer protection laws are a far different matter than prohibiting most of the population from imparting or receiving an entire category of speech that is central to their ability to secure their legal rights in a court of law.

7. The State of Oregon Has Reasonably Available Regulatory Alternatives

Assuming that this court strikes down Oregon's UPL law under the First Amendment, how might the State of Oregon protect its consumers against receiving erroneous legal information or advice?

First, with relatively few exceptions, there has been no attempt by the State of Oregon to regulate legal document preparation services or their activities at any level. Indeed, when Petitioner tried to get a licensing bill past the Oregon legislature, the Oregon State Bar opposed it. And so, occupational regulation is as yet an untried option for the type of services offered by Petitioner and others. There is precedent for such regulation. For example, many states, including Oregon, offer limited practice licenses for real estate brokers (for activities that are still considered UPL in other states). See eg Cultum v. Heritage House Realtors, Inc., 694 P.2d 630 (Wash. 1985).

Second, the State of Oregon has it within its power to inform its citizens about the relative merits of getting legal

information from a lawyer as opposed to a non-lawyer. To quote from the ABA report, *Non-lawyer Activity in Law-Related Situations* :

"Americans are independent-minded and historically value choice in purchasing services of any kind. Government efforts to restrict individual choice are, thus, unpopular in this country. Further, we can reasonably assume that when consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere." (Pg 133) The Report goes on to detail "the current array of approaches to federal tax preparation and advice, a law related area that affects almost everyone including self-help consumer software, IRS tax advise, Tax preparation services, CPA, enrolled tax agents and lawyers. The report goes on to suggest that this many-options model can be useful for how "the legal profession, together with non-lawyers, can offer the public the kinds of affordable, appropriate and reasonably safe help for law-related matters that the public seeks in many areas."

To decide whether regulation is needed for a particular law-related task, the report suggests (Part Two, Section D) a three part criteria: 1) Does the non-lawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being? 2) Do potential consumers of law-related non-lawyer services have the knowledge needed to properly evaluate the qualifications of non-lawyers offering the services? 3) Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

Still another approach to regulation can be found in the Report of the California State Bar's Public Protection Committee published in 1988. In that report, an eight

member committee (half lawyers and half non-lawyers) unanimously recommended that the legislature enact a number of consumer protection statutes that would require all non-lawyers providing law-related services to register and would provide injured customers with targeted speedy and affordable remedies.

If the Oregon judiciary is concerned about the impact that a more permissive environment for legal information might have on its operations, it can do what other government entities do. It can take steps to provide enough information to allow people to use the courts without information intermediaries, if that is their choice. The judiciary may also simplify its procedures so that less outside clerical assistance is necessary. Lest this approach be thought unfeasible, the Maricopa County Superior Court in Arizona has recently established a pro per service in the courthouse and by all reports, people are now able to do much of their own legal work without the use of an intermediary whether it be a lawyer or a legal typing service. And thanks to training sessions conducted by the Maricopa Superior Court, a number of other states are following their lead.

III. THIS PETITION SHOULD BE GRANTED BECAUSE THE OREGON UPL LAW IS OVERBROAD AND INVALID ON ITS FACE IN THAT IT BANS AN UNDEFINED CATEGORY OF FULLY PROTECTED SPEECH.

Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987) states the test for when a rule may be declared to be facially invalid:

"Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it

also threatens others not before the court - those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985).

When a law such as the Oregon UPL law is intended to be so broad that it is left undefined, it certainly meets the overbreadth test and should be struck down without regard to the facts of Petitioner's individual case. Returning to the Gilchrist case, it's hard to imagine a broader ban on an entire category of fully protected speech. Without question, the Oregon UPL law not only bans speech that might reasonably be considered to be the practice of law, it also chills speech that articulates general information available in writing, often in government documents intended to instruct the public on handling a legal problem, or in privately published materials often authored by lawyer-experts. For example, a law library reference librarian or a court clerk may be reluctant to answer the simplest question about Oregon law or legal procedure. Only by standing the First Amendment on its head can this type of ban of fully protected speech be justified.

CONCLUSION

Millions of Americans suffer from a legal access gap created by our current legal system. This access gap exists in Oregon as well as in most other states. Under the Oregon UPL statute, as interpreted by Oregon case law, Petitioner is prevented from personally disseminating any information that would help her customers access and use the Oregon judiciary. The dissemination of legal information in a one on one context is fully protected speech under the First Amendment to the U.S. Constitution. Petitioner and other

non-lawyers may only be barred from engaging in such speech if the State of Oregon has a compelling state interest in such a drastic form of regulation. Oregon has failed to demonstrate this compelling state interest, but if it does, its method of serving that interest must be narrowly tailored. The Oregon UPL law is the broadest rather than the narrowest possible method of serving its interests, and cannot, therefore, withstand scrutiny under the First Amendment, both as applied and on its face. Assuming that Oregon has a compelling interest to regulate legal information and advice, many regulatory devices other than the UPL laws are available to Oregon for this purpose.

DATED: January 4, 1998

Respectfully submitted,

Robin Smith

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(503)245-0258

Pro se

APPENDIX

A. ORDER DENYING REVIEW

B. MONEY JUDGMENT

C. OREGON COURT OF APPEALS DECISION, HASELTON, J.

D. FINDINGS OF FACT AND CONCLUSIONS OF LAW

E. JUDGMENT AND DECREE PERMANENT INJUNCION

F. PETITION FOR REVIEW TO OREGON SUPREME COURT

G. APPEALANT'S BRIEF

H. TRANSCRIPT TRIAL COURT, SELECTIONS

I. ABA NON LAWYER ACTIVITY IN LAW RELATED SITUATIONS, SELECTIONS

(2)

Supreme Court, U.S.
FILED
JAN
5 - 1998
OFFICE OF THE CLERK

No. 97 1122

In The
Supreme Court of the United States
October Term, 1997

*

ROBIN SMITH,
Petitioner,

v.

OREGON STATE BAR,
Respondent.

*

Petition For Writ of Certiorari
To the Oregon Supreme Court

*

PETITION FOR WRIT OF CERTIORARI

Appendix Part 1

*

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Pro se

77 pp

PETITION FOR WRIT OF CERTIORARI

Appendix A

IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON STATE BAR, a public corporation,) Washington
) County Circuit
Plaintiff-Respondent,) Court C940597CV
Respondent on Review,)
V) CA A89206
ROBIN S. SMITH) SC S44532

ORDER DENYING REVIEW

The Court has considered the petition for review and ORDERS that it be denied. Dated this 7th day of October 1997.

s/_____
Wallace P. Carson, Jr.
CHIEF JUSTICE

c: AllenReel
Stu Sugarman
Thomas J. Mack
Stephen B Mercer

PETITION FOR WRIT OF CERTIORARI

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON STATE BAR,
a public corporation, Respondent

v.

ROBIN SMITH, and PEOPLE'S PARALEGAL SERVICE, INC., Appelants
an Oregon corporation,

(C94-0597CV; CA A89206)

Appeal from Circuit Court, Washington County, Michael J. McElligott, Judge.

Thomas J. Mack, Washington, D.C., argued the cause for appellants.

Allen Reel argued the cause for respondent.

Before Deits, Chief Judge, Haselton, Judge, and Richardson, Senior Judge.

HASELTON, J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[X] Costs allowed, payable by: Appellants

MONEY JUDGMENT

Judgment #1

Creditor: OREGON STATE BAR

Debtor: ROBIN SMITH, and PEOPLE'S PARALEGAL SERVICE, INC.,

Costs: $ 302.50

Attorney fees: 15,993.75

TOTAL AMOUNT: $16,296.25

Interest: Simple, 9% per annum, from the date of this appellate judgment.

Appellate Judgment

Effective Date: December 5, 1997

PETITION FOR WRIT OF CERTIORARI

Appendix C

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON STATE BAR,
a public corporation, Respondent

v.

ROBIN SMITH, and PEOPLE'S PARALEGAL SERVICE, INC., Appelants
an Oregon corporation,

(C94-0597CV; CA A89206)

Appeal from Circuit Court, Washington County, Michael J. McElligott, Judge.

Thomas J. Mack, Washington, D.C., argued the cause for appellants.

Allen Reel argued the cause for respondent.

Before Deits, Chief Judge, Haselton, Judge, and Richardson, Senior Judge.

HASELTON, J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing Party: Respondent

Cost allowed payable by Appellants

HASELTON, J.

Defendants, People's Paralegal Service, Inc., and its president, Robin Smith, appeal from a judgment declaring them to have engaged in activities that constitute the unauthorized practice of law, ORS 9.160, and enjoining them from those activities. ORS 9.166. They argue that the injunction violated rights of free expression under the Oregon Constitution, Article I, section 8, and due process under the First and Fourteenth Amendments to the United States Constitution. We affirm.

From 1987 until 1995, when the injunction issued, defendants operated a business providing "legal technician" services for a fee. The services included providing consumers[1] with various legal forms available to the public through such sources as Stevens Ness Publishing Company, NOLO PRESS, bankruptcy courts, and the Oregon State Bar, and advising them with respect to their individual legal concerns.[2] Defendants

1 We use the ambiguous, and perhaps infelicitous, term "consumers"--rather than "clients" or "customers" quite consciously. Either of the latter two terms implicitly decides the central question before us.

2 The trial court made specific findings regarding six different occasions when People's Paralegal advised consumers as to their specific legal problems on issues including service of

never attempted to represent consumers in court, nor did they sign any documents as attorneys. Moreover, People's Paralegal posted signs at its place of business advising consumers that its employees were not attorneys, and its intake sheets, which were signed by the consumers, included the following statement:

"WE ARE NOT ATTORNEYS. WE ARE LEGAL TECHNICIANS.OUR SERVICE PROVIDES PREPARATION OF THE PAPERS INCLUDING TYPING, NOTARY SERVICE, AND PROCEDURAL INFORMATION. * * * IF YOU REQUIRE LEGAL ADVICE PLEASE SEE AN ATTORNEY."

Nevertheless, defendants did provide legal advice to consumers, and some of those persons relied on defendants' advice in resolving their legal problems.

Plaintiff Oregon State Bar brought this action in April 1995, alleging that defendants were engaged in the unlawful practice of law under ORS 9.160 and seeking injunctive relief under ORS 9.166. 3 Defendants answered and asserted, inter alia,

3 process, persons entitled to notification and proper venue in guardianship proceedings, legal issues that arise in marital dissolution proceedings, such as property settlements, including obtaining a Qualified Domestic Relations Order, and child support, how to obtain legal custody of a child, and how to amend a complaint. In some of these cases, People's Paralegal's advice was incorrect and ultimately harmed the consumers.

ORS 9.160 provides:

affirmative defenses that ORS 9.160, either facially or as applied, violated rights of free expression under Article I, section 8, of the Oregon Constitution and also violated constitutional due process guarantees. The trial court disagreed and granted the injunction, which provided, in part:

> [Defendants] * * * are * * * enjoined from practicing law including:
>
> "1. Enjoined from any personal contact with any persons in the nature of consultation, explanation, recommendation, or advice regarding their legal matters.
>
> "2. Enjoined from meeting with any persons to discuss their individual facts and circumstance~ relating to their need or desire for legal forms, legal services or legal assistance.
>
> "3. Enjoined from obtaining information orally,
>
> "Except for the right reserved tb litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar."

ORS 9.166 provides, in part:

> "(1) If the [Board of Governers of the Oregon State Bar) has reason to believe that a person is practicing law without a license, the board may maintain a suit for injunctive relief in the name of the Oregon State Bar against any person violating ORS 9.160. The court shall enjoin any person violating ORS 9.160 from practicing law without a license."

in writing, or in any other manner relating to individual facts and circumstances so as to assist any persons with their legal matters.

"4. Enjoined from advising any persons regarding their eligibility for or advisability of legal remedies to address any person's particular legal matters.

"5. Enjoined from advising any persons regarding procedural functions of the court system as it relates to any person's particular legal matters including advice regarding jurisdiction or venue.

"6. Enjoined from assisting in selecting particular forms, documents or pleadings for any persons to address their legal matters.

"7. Enjoined from assisting in any way with the preparation or filling out of legal forms, or any parts of such forms, documents or pleadings for any persons.

"8. Enjoined from assisting, suggesting or advising any persons how forms, documents or pleadings should be used to address or to solve particular legal problems.

"9. Nothing included in this Judgment and Decree precludes Defendant Smith from working for someone authorized to practice law so long as she is acting within the course of her duties and under the direction and supervision of an individual authorized to practice law."

On appeal, defendants renew and reiterate their constitutional challenges to ORS 9.160, both on its face and as applied. We begin with defendants' free expression arguments under Article I, section 8. Article I, section 8, provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Defendants' principal argument is that, because the practice of law necessarily involves the "exchange of legal information," ORS 9.160 impermissibly prohibits, or impairs, constitutionally protected expression. Plaintiff responds that the statute does not explicitly refer to expression or to the content of expression. Rather, plaintiff argues, the statute is merely directed to regulating the practice of a profession, which, like many other professions, involves expression. Thus, plaintiff reasons, ORS 9.160 does not embody an impermissibly "content-driven" restriction of expression. Before addressing those arguments, it is useful--indeed, essential--to briefly review the history of the regulation of law practice in Oregon.

During territorial times and for the first 60 years of Oregon's statehood, restrictions on the practice of law were minimal. That relative lack of regulation appears to have been a product of post-Jacksonian and, later, populist hostility to a perceived professional elite. Barlow F. Christensen, The

Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors--or Even Good Sense?, 1980 Am B Foun Res J 159, 169-74. The restrictions that were imposed pertained solely to litigation practice- -that is, to qualifications to appear before courts and to sign pleadings. There were few, if any, restrictions on the rendition of general out-of-court legal advice.[5]

See Unauthorized Practice of Law at 172:

> "A product of frontier conditions, this egalitarian spirit, which held any man capable of doing anything, gave real impetus to the movement to open up the practice of law to any who might wish to pursue it, without regard to educational or other qualifications. As Pound put it, 'As to the law, the formative era is one of upbuilding. As to the profession, it is one of a vain struggle to maintain what had been achieved at the time of the Revolution.'" (Footnotes omitted.)

5 See Id. at 173-74:

> "Legislation in New Hampshire in 1842 provided that every citizen over 21 years of age might practice law, without any other qualifications. In 1843 legislation opened up the practice of law in Maine to every citizen, and a similar Wisconsin law of 1848 gave the privilege of law practice to every resident. A provision of the 1851 Indiana constitution extended to every voter the privilege of practicing law. As a practical matter, then, by the time of the Civil War there were no significant restrictions on admission to law practice.

The only pre-statehood regulation of law practice we have located is a rule that the Supreme Court of the Oregon Territory published in 1852, which addressed practice in that court:

"1. Attorneys and counsellors at law, and solicitors in chancery, of the several District Courts of this territory, shall on notice in open court, be admitted to practice in the Supreme Court; but all the preliminary steps necessary to bring a cause to this court, and prepare the same for trial, may be taken by any attorney, solicitor or counsellor of any of the District Courts." Rules Adopted at the Supreme Court of Oregon Territory (Dec:ember Term 19~2) -

In 1862, Oregon enacted legislation that provided that

* * * * *

"* * * Because the practice of law was open to virtually anyone, there was little cause for unauthorized practice; those who might otherwise have been unauthorized practitioners could now, with virtually no effort, be duly recognized as attorneys. And, under the permissive conditions that existed from the early nineteenth century until well after the Civil War, even those who might not have bothered to seek admission to law practice would have found little to inhibit their law practice activities." (Footnotes omitted.)

See also Commission on NonLaywer Practice, American Bar Association, NonLaywer Activity in Law-Related Situations 15 (1995) ("In the 19 new states admitted to the union between independence and 1860, the earliest colonial era model of an untrained and unregulated bar--even for appearance in court--was replicated.").

"no person shall be allowed to participate as an attorney or appear as counsel in any court of justice" unless admitted to practice by the State Supreme Court.[6] At the same time, the legislature enacted a statutory definition of "attorney":

"An attorney is a person authorized to appear for and represent a party, in the written proceedings in any action, suit or proceeding, in any stage thereof. An attorney, other than the one who represents the party in the written proceedings, may also appear for and represent a party in court, before a judicial officer, and then he is known, in the particular action, suit or proceeding, as counsel only, and his authority is limited to the matters that transpire in the court or before such officer at the time." General Laws of Oregon, ch 14, § 1000, p 397 (Civ Code) (Deady 1845-64).

The legislature also prescribed requirements for admission as an attorney[7] and codified a summary of attorneys' duties.[8]

6 General Laws of Oregon, ch 14, § 1002, p 398 (Civ Code) (Deady 1845-64).

"An applicant for admission as attorney must apply to the supreme court, and must show:

"1. That he is a citizen of the United States, and of this state, and of the age of twenty-one years, which proof may be 'made by his own affidavit;

"2. That he is a person of good moral character, which may be proved by any evidence satisfactory to the court;

"3. That he has the requisite learning and

ability, which must be shown by the examination of the applicant, by the judges, or under their direction, in open court, at the term at which the application is made." General Laws of Oregon, ch 14, § 1003, p 398-99 (Civ Code) (Deady 1845-64).

"It is the duty of an attorney:

"1. To support the constitution and laws of the United States, and of this state;

"2. To maintain the respect due to the courts of justice and judicial officers;

"3. To counsel or maintain such actions, suits or proceedings or defenses, only, as may appear to him legal and just, except the defense of a person charged with a public offence;

"4. To employ, for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and never to seek to mislead the court or jury, by any artifice or false statement of law or fact;

"5. To maintain, inviolate, the confidence, and at every peril to himself, to preserve the secrets of his clients;

"6. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party' or witness,,unless required by the justice of the cause with which he is charged;

"7. Not to encourage either the commencement or the continuance of an action, suit or proceeding, from any motives of passion or interest; and,

"8. Never to reject, for any consideration

In 1919, the legislature enacted Oregon's first statute addressing the unlawful practice of law:

"It shall be unlawful for any person, firm, association of persons or corporation to engage in the practice of law within the state of Oregon after the taking effect of this act, without first having been duly admitted and licensed as an attorney at law in the courts of this state." Oregon Laws 1920, ch V, § 1093-1, p 949 (Spec Sess) .9

The legislature concomitantly enacted a definition of the "practice of law":

> "Any person, firm, association of persons or corporation shall be regarded as engaging in the practice of law within the meaning of this act who shall undertake to represent or who shall represent parties litigant in courts of justice other than courts of justices of the peace, or district courts, or who shall, for a fee, prepare or undertake to prepare pleadings or other papers incident to actions, suits or special proceedings, or manage or undertake to manage such actions, suits or proceedings on behalf of clients before judges or courts, or in any manner act professionally in legal formalities, negotiations or proceedings, by warrant or authority of clients or otherwise[.]" Oregon Laws 1920, ch V, § 1093-2, p 949 (Spec Sess)

> personal to himself, the cause of the defenseless or the oppressed." General Laws of Oregon, ch 14, § 1006, p 399-400 (Civ Code) (Deady 1845-64).

Violation of that statute was a misdemeanor, which could be punished by a fine of not more than $100, imprisonment in the county jail for a period of not more than 90 days, or both. Oregon Laws 1920, ch V, § 1093-3, p 949 (Spec Sess)

That definition encompassed litigation practice, which was the focus of earlier definitions of "attorney," as well as broader matters of client representation, i.e., "act [mg] professionally in legal formalities, negotiations or proceedings by warrant or authority of clients or otherwise[.]" However, it did not refer to, much less purport to regulate, the rendition of general, nonlitigation-related advice.

In 1937, the legislature deleted the definition of the "practice of law" from the unlawful practice statutes. Or Laws 1937, ch 343, § 2. Thereafter, the law simply provided:

> "Reserving to litigants the rights * * * to prosecute or defend a cause in person, it shall be unlawful for any person to practice law or to represent himself as qualified to practice law after the taking effect of this act, unless he shall be an active member of the Oregon state bar * * *. Any person who is an active member of the Oregon state bar, * * * or who hereafter shall become such active member, hereby is authorized to engage in the practice of law." Or Laws 1937, ch 343, § 1.

That open-ended--and, arguably, amorphous-approach was characteristic of contemporaneous unauthorized practice statutes enacted in other jurisdictions. See The Unauthorized Practice of Law at 192. In Oregon, as in many other jurisdictions, the particularized definition of the "practice of law" was committed

to case-by-case development by the courts.

The first Oregon decision to address that question was State ex rel. Oregon State Bar v. John~ton, 158 Or 52, 74 P2d 395 (1937). In Johnston, a disbarred attorney was fined for continuing to practice law. The court noted that the defendant

> "continued to occupy an office in the city of Portland, on the door of which appeared a sign reading, 'Harold W. Johnston, Attorney at Law'; * * * accepted employment from one Frances Peecher to secure a divorce for her; prepared a complaint for her to sign; and procured another attorney to sign the complaint as attorney for plaintiff." Id.. at 53.

The defendant had also effected a compromise with a client's creditors. The court concluded: "It may be doubted whether effecting a compromise with creditors constitutes practicing law. The other transaction, however, did constitute practicing law[.]" Id.. at 54. Thus, although the "practice of law" circa 1937 clearly included appearing in court and drafting court documents, it was unsettled whether that concept encompassed engaging in out-of-court negotiations on a "client's" behalf[10] or other nonlitigation-based advice and activity.

Some of that uncertainty was dispelled in State Bar V.

As noted above, the repealed statutory definition of the "practice of law" expressly included such activities.

Security Escrows, Inc 233 Or 80, 377 P2d 334 (1962). There, an escrow company appealed from a judgment enjoining it, pursuant to ORS 9.166, from drafting a range of documents, including contracts, deeds, mortgages, satisfactions, leases, and options. In reviewing the injunction, the court identified the essence of the "practice of law," as being the informed application of legal principles to address a particular person's individual circumstances and needs:

"Turning * * * to the specific matter of documents vesting property rights, the exercise of discretion concerning property rights of another should be entrusted only to those learned in the law. There are, of course, matters in which persons who are not trained in the law can give perfectly sound business advice. However, when laymen select and prepare instruments creating rights in land for other members of the public there is always the danger that they may do the job badly. In the exceptional case the routine procedure may be grossly wrong. * * * We are justified in taking judicial notice of the fact that badly drawn instruments create not only needless litigation but needless loss and liability. A little of this mischief may flow from the carelessness of lawyers, but by far the most of it is the work product of laymen. In either case the injured party may have a cause of action for damages, but it is in the public interest to keep these difficulties to a minimum.

"* * * * *

"For the purposes of this case, we hold that the practice or law includes the drafting or selection of

> documents and the giving of advice in regard thereto any time an informed or trained discretion must be exercised in the selection or drafting of a document to meet the needs of the persons being served. The knowledge of the customer's needs obviously cannot be had by one who has no knowledge of the relevant law. One must know what questions to ask. Accordingly any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties, will bring the activity within the practice of the profession." Id.. at 87, 89 (some emphasis supplied).

Applying that analysis, the court sustained the injunction to the extent that it restrained the defendants' selection and preparation of documents where that conduct required "an intelligent choice between alternative methods, ' 233 Or at 91, but concluded that the injunction was overbroad to the extent that it barred the defendants from acting as "mere scriveners" who did nothing more than till in ~ocuments ~t ~1i~ii ~ubt~tner~ direction. Id. at 91-92.

In State Bar v Miller & Co., 235 Or 341, 385 P2d 181 (1963), the court affirmed an injunction against a nonlawyer who, as part of his insurance business, provided advice on estate planning. The court held that, when a client receives advice from a nonlawyer and the advice "involves the application of legal principles[,] [t]his constitutes the practice of law." Id.

at 344. The court further explained:

> "It must be conceded that frequently advice given in the course of carrying on a business is shaped by a knowledge of the applicable law. But the giving of such advice is not in every instance regarded as the practice of law. The legal ingredient in the advice may be so insubstantial as to call for the application of the principle of de minimis non curat lex. This is not to say that we adopt the view permitting the practice of law where the legal element is merely incidental to the business activity being carried on. To fall outside the proscription of the statute the legal element must not only be incidental, it must be insubstantial. It cannot be said that one who plans another person's estate employs the law only in an insubstantial way." Id. at 344-45 (footnote omitted).

The final, and most recent, pertinent "unauthorized practice" decision is Oregon State Bar v. Gilchrist, 272 Or 552, 538 P2d 913 (1975) There, the court held that the advertising and sale of generic, noncustomized do-it-yourself divorce kits did not, without more, constitute the practice of law:

> "We find persuasive the holding in New York County Lawyers' Association V. Dacey, 28 AD 2d 161, 283 NYS 2d 984, [rev 21 NY 2d 694 (1967)]. There it was held that the publication, distribution and selling of Norman F. Dacey's book 'How to Avoid Probate' did not constitute the practice of law since the publication was directed to the general public and not to a specific individual. The dissenting opinion in the Appellate Division, which was adopted by the Court of Appeals, stated in pertinent part:
>
> * * * It cannot be claimed that the

publication of a legal text which purports to say what the law is amounts to legal practice. And the mere fact that the principles or rules stated in the text may be accepted by a particular reader as a solution to his problem, does not affect this.
* * *

"'Dacey's book is sold to the public at large. There is no personal contact or relationship with a particular individual.

Nor does there exist that relation of confidence and trust so necessary to the status of attorney and client. This is the essential of leaal oractice--the representation and the advising of a particular person in a particular situation

"* * * * *

"We conclude that in the advertising and selling of their divorce kits the defendants are not engaged in the practice of law and may not be enjoined from engaging in that part of their business." 272 Or at 558-59, 563 (emphasis supplied)

Thus, the mere general dissemination of legal information by nonlawyers does not constitute the unauthorized practice of law. The court proceeded, however, to conclude that other, more personalized contact and advice was properly enjoined:

"(A] 11 personal contact between defendants and their customers in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or advising how the forms should be used in solving the particular customer's marital problems does constitute the practice of law

and must be and is strictly enjoined." Id. at 563-64. There have been no notable ~ decisions amplifying or refining the meaning of "practice of law. "'~

> We cannot, and will not, purport to derive an omnibus

In Oregon State Bar v. Wright, 280 Or 693, 573 P2d 283 (1977) , the court generally affirmed an injunction restraining the non-lawyer defendant from providing in-court representation and litigation-related services that fell within the narrowest historically recognized concept of "practice of law." See ___ Or App at ___ (slip opinion at 8-11). In so holding, the court rejected the defendant's argument that ORS 9.160 was unconstitutionally vague (the defendant did not raise any free exercise challenge under Article I, section 8) and reiterated the statute ' 5 consumer-protective purpose:

> "[T]here is no 'right,' as a matter of 'free enterprise, ' to engage in many professions and occupations because of the provisions of statutes which provide that only persons who are properly qualified, accredited and licensed by a board or commission established by statute may engage in those professions and occupations. These include doctors, dentists, architects, engineers, accountants, real estate brokers, land surveyors, funeral establishments, auctioneers, barbers, plumbers, and many other professions and occupations.
>
> "* * * * *
>
> "The reason f6r the statutes relating to all of these professions and occupations is to protect the public from the consequences resulting from attempts to engage in such professions and occupations by persons who are not properly trained and qualified to do so." Id. at 697-98 (footnote omitted)

definition of "practice of law" from Johnston, Security Escrows, Miller, and Gilchrist. Indeed, Security Escrows cautions that a determination of unauthorized practice may depend on case-specific circumstances. 233 Or at 85-89. Nevertheless, regardless of any uncertainty at the margins, certain core criteria are well settled. Most significantly, for present purposes, the "practice of law" means the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice, or other assistance.

We return, then, to defendants' arguments that ORS 9.160 violates Article I, section 8. In City of Eugene v Miller, 318 Or 480, 871 P2d 454 (1994), the court summarized the controlling analysis, enunciated in State v Robertson, 293 Or 402, 649 P2d 569 (1982), and State v. plowman, 314 Or 157, 838 P2d 558 (1992), cert den 508 US 974 (1993), which delineates three types of statutes implicating expression:

> "The first Robertson category consists of laws that 'focus on the content of speech or writing' or are '"written in terms directed to the substance of any 'opinion' or any 'sub~ect' of communication."' Laws within that category violate Article I. section 8, 'unless the scope of the restraint is wholly confined

> within some exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.' The second Robertson category consists of laws that 'focus[] on forbidden effects, but expressly prohibit[] expression used to achieve those effects.' Laws in that category 'are analyzed for overbreadth.' Finally, the third Robertson category consists of laws that 'focus[] on forbidden effects, but without referring to expression at all.' Laws within the third category are analyzed to determine whether they violate Article I, section 8, as applied." City of Eugene, 318 Or at 488 (citations omitted; emphasis in original)

See also Fidangue v. Oregon Govt. Standards and Practices, 141 Or App 495, 500-501, 920 P2d 154, rev allowed 324 Cr 47 (1996) (summarizing methodology).

That analysis, as framed and applied by the Supreme Court and our court, assumes that all statutes must fall into one of the three enumerated categories, no matter how awkward the fit. The Robertson/Plowman taxonomy seems somewhat ill-suited in assessing the constitutionality of a general professional licensing and regulatory scheme, in that virtually every profession--eg, medicine, psychiatry, teaching, accounting--involves some element of expression, albeit in the context of the broader rendition of professional services. The same could be said of such licensed vocations as securities, insurance, or real

estate brokerage. Nevertheless, the Robertson/Plowman methodology purports to describe the applicable universe, and we proceed to apply it.

Defendants first argue that ORS 9.160 is facially unconstitutional, as falling within the first Robertson/Plowman category, because it burdens a type of expression, viz "out-of court legal speech," that did not fall within any historical exception recognized at the time of statehood. Whatever the merits of defendants' arguments about the historical status of nonlitigation-related speech, their argument fails in its first premise: CR5 9.160 is not "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." Robertson, 293 Or at 412.

As noted in Gilchrist, CR5 9.160 does not proscribe the mere generalized exchange of legal information or discussion of legal issues. 272 Or at 558-59, 563. Rather, the statute is expressly directed to limiting the conduct of a profession--the practice of law--to those who possess certain qualifications. It cannot be gainsaid that some part of the practice of law involves expression--and, indeed, that expression is an indispensable

component of some aspects of legal practice. However, as described above, the practice of law involves conduct, processes, and relationships that transcend mere expression. In that respect, ORS 9.160 and the corollary legal licensing statutes are no different from other professional licensing and regulatory schemes. Defendants' analysis, if extended in principle, would compel the invalidation of many, and perhaps all, of those analogous statutes. ~, e.g., ORS 677.080; ORS 677.085 (prohibiting unauthorized practice of medicine); CRS 675.020 (prohibiting unauthorized practice of psychology); ORS 673.615 (prohibiting unauthorized practice of tax consulting). ORS 9.160 does not fall within the first Robertson/Plowman category.

The closer question is whether the statute is more properly consigned to the second Robertson/Plowman category, or to the third. ~, e.g., State v. Chakerian, 135 Or App 368, 373-75, 900 P2d 511, aff'd 325 Or 370, - P2d ___ (1997).

An initial difficulty with assigning the statute to either category is that both assume that the statute, either by its terms or by reference to context, "focuses on" some discrete "forbidden effect." Plowman, 314 Or at 164. See State v.

Stoneman, 323 Or 536, 546, 920 P2d 535 (1996) ("An examination of the context of a statute, as well as its wording, is necessary to an understanding of the policy that the legislative choice embodies." (Emphasis in original.)). The problem, however, is that, just as CR5 9.160 does not, by its terms, refer to "the substance of any 'opinion' or any 'subject' of communication," Robertson, 293 Or at 412, the statute also does not expressly refer to any targeted harmful effect of the unauthorized practice of law. Nor is the targeted harm obvious from statutory context, including particularly other laws pertaining to licensing and regulation of attorneys. ~, e.g., ORS 9.241 (regulating appearances in court by attorneys licensed in other jurisdictions) ; CR5 9.280 (regulating immigration consulting to members of Oregon State Bar); ORS 9.500 (prohibiting some forms of solicitation by attorneys)

To be sure, ORS 9.160 and other related statutes could reasonably be, and have been, viewed as consumer-protective measures. ~, e.g., Security Escrows; Miller. Conversely, those statutes could be read, just as plausibly and less benignly, as perpetuating a professional "monopoly." Our point

is not to give credence to the latter reading, and certainly not to take issue with the former. Our concern, rather, is that neither an examination of the unadorned "context of the statute [nor] of its wording" yields a clear "understanding of the policy that the legislative choice embodied." Stoneman, 323 Or at 536.12 It is tempting in such circumstances to carve out a fourth category, beyond the Robertson/plowman three, consisting of statutes that neither expressly prohibit expression nor are directed against some textually or contextually verifiable evil, but whose application may, nevertheless, collaterally burden expression. Unfortunately, the Prevailing methodology seems to foreclose that possibility.

So constrained, we consign CR5 9.160 to the third Robertson/plowman category. To fall within the second, a statute must "expressly prohibit expression." Plowman, 314 Or at 164. See Stoneman, 323 Or at 543 ("If such a statute expressly prohibits certain forms of expression, it must survive an

12 It is unclear what role, if any, general judicial discussions of a statute's purposes, e.g., Security Escrows; Wright, play in contextual inquiry, which, at least in Stoneman, referred exclusively to the text and structure of related statutes.

overbreadth challenge [.]") . In Chakerian, we considered the content of that requirement:

"[W]hat does it mean that a statute 'expressly prohibits expression'?

> "We perceive in Robertson's progeny two classes of statutes that fall within the second Robertson category. The first includes statutes that explicitly identify communicative conduct as a proscribed means of achieving a forbidden effect. * * *

"The second class of statutes is less obvious. It includes statues that, although they do not explicitly refer to communicative conduct, can be violated only by means of expression. In other words, regardless of the statute's particular language, a person cannot violate the statute without engaging in communicative conduct. That class acknowledges the dictates of substance over form. Regardless of the precision- -or, perhaps the studied imprecision--of statutory language, when expression is the only possible means of violating the statute, the statute, necessarily, expressly proscribes expression." 135 Or App at 375 (emphasis in original; footnote omitted).

Here, as noted, CR5 9.160 does not "explicitly identify communicative conduct as a proscribed means of achieving a forbidden effect." 135 Or App at 375. The statute does not explicitly refer to expression at all.

Nor can CR5 9.160 be "violated only by means of expression." Chakerian, 135 Or App at 375. (emphasis in original) . Our conclusion in that regard flows from the essence

of the "practice of law"--and, thus, of the unauthorized practice of law--described above. That essential element is the rendition of legal services that required the exercise of informed discretion in applying legal principles to address a particular "client's" individual needs. ___ Or App at (slip opinion at 18). Some of those services are intrinsically communicative or expressive eg, advice, negotiation, or drafting. But others, for which attorneys routinely bill their clients, are not--including, most significantly, research and analysis. Indeed, even advice, negotiation, and drafting, are only the final, articulated products of the skills and processes that form the core of the lawyer's craft, the exercise of professional judgment. In a related sense, the consumer-protective policies that underlie ORS 9.160 may ~e offended not merely by what is expressed, but also by what is not--by advice not given and by actions not taken. Because CR5 9.160 can be violated by means other than expression, it falls, albeit somewhat unsatisfactorily, into the third Robertson/Plowman category.

Statutes in the third category "are analyzed to determine whether they violate Article I, section 8, as applied."

Miller, 318 Or at 488. Such statutes "are subject to challenge * * * on vagueness grounds or on the ground that the statute's reach, as applied to defendant, extends to privileged expression." Stoneman, 323 Or at 543. In Creaon State Bar v Wright, 280 Or 693, 700-701, 573 P2d 282 (1977), the court concluded that ORS 9.160 was not unconstitutionally vague for purposes of the Fourteenth Amendment to the United States Constitution, and plaintiff here advances no persuasive reason for reaching a different conclusion under Article I, section 8. Nor was the statute's application to defendant's activities impermissibly overbroad. The injunction, issued pursuant to

> 9.160 and CR5 9.166, carefully limits the breadth of its prohibition to conduct, including communication, that pertains to representing and counseling persons with regard to their particular legal matters. Such a prohibition does not impermissibly burden protected expression for purposes of Article I, section 8.

Defendants' second assignment of error asserts, primarily, that the injunction itself is overbroad under the First and Fourteenth Amendments to the United States

Constitution. Defendants argue:

"The trial court's injunction banned Ms. Smith from all law practice including all forms of federal and state sanctioned nonlawyer law practice. In doing so, the trial court's injunction order violates Ms. Smith's rights to free speech and association guaranteed by the First and Fourteenth Amendments * * , as well as by the Oregon Constitution.

"* * * * *

> "In short, while certain areas of law practice are proscribed, large areas of nonlawyer practice are state and federally sanctioned. Yet the trial court's injunction prospectively bans Ms. Smith and her company from all forms of law practice, whether authorized or not. State and federally sanctioned legal advice is educational speech and cannot be banned absent a compelling state interest and means narrowly tailored to further the state's interest while protecting the speakers right to speak freely."

That argument fails. As we have explained, the injunction does not ban speech qua speech; it restrains speech in the context of a putatively professional relationship. As significantly, defendants have not demonstrated that they actually engage in practices within the supposed areas of overbreadth.[13] Finally, and in all events, defendants' argument

[13] We note particularly that plaintiffs' "applied" arguments, as briefed, do not challenge the validity of paragraph 7 of the injunction, see ___ Or App at ___ (slip opinion at 4) as applied to their practices and operations. Compare, eg, Security Escrows, 233 Or at 91-93.

assumes, without apt authority or analysis, that the First Amendment somehow generally preempts state law-based restraints on unauthorized legal practice of law. The only authority defendants invoke, United Transportation Union v. State Bar of Michigan, 401 US 576, 91 5 Ct 1076, 28 L Ed 2d 339 (1971) , and Brotherhood of Railway Trainmen v. Virginia, 377 US 1, 84 5 Ct 1113, 12 L Ed 2d 89 (1964) , involved injunctions actually burdening the continuing exercise of rights of labor organization and representation. Here, defendants have not shown any such impairment.[14]

14 We have found no cases expressing a general federal disapproval of state law-based restrictions on the unauthorized practice of law. See for example, Thomas v. Collins, 323 US 516, 544-45, 65 5 Ct 315, 89 L Ed 430 (1945) (Jackson, J., concurring)

> "A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, the state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. * * *
>
> "This wider range of power over pursuit of a calling than over speech-making is due to the different effects which the two have on interests which the state

We reject defendants' remaining arguments without further discussion.

Affirmed.

> is empowered to protect. The modern state owes and attempts to perform a duty to pro~ect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system."

PETITION FOR WRIT OF CERTIORARI

Appendix D

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

OREGON STATE BAR, Plaintiff v. ROBIN S. SMITH and PEOPLE'S PARALEGAL SERVICE, INC. Defendants.	) C940597CV))) FINDINGS OF FACT) AND CONCLUSIONS) OF LAW)

The court makes the following FINDINGS OF FACT:

1. The Oregon State Bar, which was created by the State Bar Act, ORS 9.001 et seq, is a public corporation and an instrumentality of the Judicial Department.

2. The Oregon State Bar at all times relevant was authorized to carry out the provisions of Chapter 9 of the Oregon Revised Statutes relating to the unlawful practice of law, including maintaining a suit for injunctive relief.

3. Defendants were and are engaged in business in the State of Oregon with a principal place of business in Washington County.

4. Defendants are not attorneys nor members of the Oregon State Bar.

5. Plaintiff first mailed a copy of the complaint in this case to the Oregon Attorney General on April 19, 1995. Receipt was acknowledged.

6. People's Paralegal Service began business approximately July 1987. At all relevant times, Defendant Robin Smith was the President of People's Paralegal and its employee.

7. At all relevant times the intake sheet which were signed by customers of People's Paralegal included:

WE ARE NOT ATTORNEYS. WE ARE LEGAL TECHNICIANS. OUR SERVICE PROVIDES PREPARATION OF THE PAPERS INCLUDING TYPING, NOTARY SERVICE, AND PROCEDURAL INFORMATION* IF YOU REQUIRE LEGAL ADVICE PLEASE SEE AN ATTORNEY. (Ex. 1)**

8. At all relevant times signs posted in the offices of People's Paralegal declared employees of People's Paralegal are not attorneys.

9. Since July, 1987, People's Paralegal Service, Inc. has provided services to approximately 9,000 customers.

10. The average fee collected by Defendants is $165 to $175.

11. Forms used by Defendants in their business are obtained through various sources available to the public, such as Stevens Ness Publishing Company, NOLO PRESS (a vendor of self-help law books and software), courthouses, banicruptey courts, and various Oregon State Bar Continuing Legal Education texts.

12. Defendant Smith founded the Oregon Legal Technicians Association (OLTA) in January, 1991. OLTA has actively lobbied for licensing of legal technicians, and Defendant Smith has been an active lobbyist during Oregon Legislative Sessions for this proposed legislation and has given testimony before legislative committees.

13. Defendant Smith provided written and oral testimony to the 1991 Oregon State Bar Unlawflil Practice of Law Task Force.

14. In 1992, the Oregon State Bar Bulletin published an article written by Defendant Smith concerning legal technicians.

15. Defendants have been vocal and open proponents for the licensure of legal technicians, and for change to ORs 9.160 ~ seq to permit Defendants and others to provide legal services to the public without violating said statutes.

16. Defendant Smith was contacted three times by people who identified themsselves as being representatives of the Oregon State Bar concerning alleged unauthorized practice of law (UPL). The initial contact was shortly after People's Paralegal Service, Inc. started business. The last contact was after Defendant Smith testified on November 19, 1992, in St. v. Gifford.

17. Sue Gifford desired legal services to obtain guardianship over her elderly father who was suffering from Alzheimers and was confined to a nursing home.

18. Gifford contacted corporate Defendant and corporate Defendant met with Gifford and discussed her legal matter.

19. Corporate Defendant questioned Gifford about the individual facts and circumstances involved in her case.

20. Corporate Defendant analyzed Gifford's situation and advised her regarding the filing
of a petition to gain guardianship over her father.

21 Corporate Defendant selected and provided forms to obtain guardianship including a Petition for Appointment of Guardian, Affidavit of Proof of Mailing or Delivery of Notice of Hearing, and Order Appointing visitor.

22. Corporate Defendant drafted, prepared and completed the forms.

23. Corporate Defendant advised Gifford about various terms including the definition of a ward, the financial resources to be listed, and the persons entitled to notification.

24. Corporate Defendant discussed with and explained to Gifford legal procedures including the procedure for service by publication, the filing process, and the visitor's investigation.

25. Corporate Defendant undertook to advise Gifford regarding the response to inquiries made by the Court as to the appointment of the visitor, the proper venue for the matter, and the residence of the ward.

26. Corporate Defendant prepared for Gifford's signature a letter addessing those matters.

27. Corporate Defendant filed the guardianship pleadings for Gifford.

28. Corporate Defendant charged Gifford for its services and collected fees from Gifford.

29. Gifford did not know how to proceed with obtaing guardianship and relied on the advice of Corporate Defendant.

30. The Oregon State Bar first discovered Corporate Defendant's conduct on April 7,
1993, when Glenn Leier, Chair of the Legal Assistants Joint Counsel, contacted the Bar about the Gifford matter.

31. The third member of the Oregon State Bar who contacted Defendant Smith was Jeffery Sapiro, the Bar's Disciplinary Counsel. Defendant Smith invited Mr Sapiro to her

office in January, 1992. Approximately one week before this meeting. Mr Sapiro told the Chairperion of the UPL Commrttee, Thomas Christ, he would be meeting with Ms. Smith, the President of the OLTA, to determine whether discussions concerning the lawftul extent of her activities would be fruitful. Mr. Sapiro advised Mr. Christ, as far as he could determine, neither the Bar nor the Department of Justice had received any UPL complaints against Ms. Smith in nearly three years, and if there was disagreement between Defendants' view of UPL and the Bar's views, then a declaratory judgment might be filed. (Ex. 109)

32 Ms. Smith was candid with Mr. Sapiro during their January, 1992, meeting. At no me did Mr Sapiro tell Ms. Smith Defendants would be sued for engaging in the unauthorized 'actice of law unless she stopped her current business practices.

33. The Oregon State Bar never sent Defendants an admonition letter, never sought pre'it resolution by agreement, nor any other form of discretionary resolution of any UPL complaint "inst Defendants before this suit was commenced by the Bar in June, 1994. Doing so would have been fruitless because Defendant Smith truly believes she is a person with a cause. She will not desist short of being ordered to do so.

34. The Board of Governors(BOG) initially approved filing an injunctive suit against defendants on April 29, 1989, in UPL case 13-87. (Ex. 102)

35 Plaintiff hired a private investigator to assist in the investigation of the 13-87 claim. his was the first time the Bar had used a private investigator for such a puruose.

36. On October 1, 1991, the BOG unanimously directed the Disciplinary Counsel to enter to a dialogue with Defendant Smith regarding what the law allows or prohibits a nonl-awyer to do, and if an agreement could not be reached, the matter would be referred back to the Board to insider whether a declaratory or injunctive relief was appropriate.

37. After Mr. Sapiro met with Ms. Smith in January, 1992, he told the BOG Ms. Smith as careful to disclose to her customers she was not an attorney and could not give legal advice. Mr. Sapiro also advised the BOG Ms. Smith had been made aware the courts have defined the practice of law more broadly than she does, but she believed such a view denies affordable legal services to many people. The BOG was also told Defendant Smith had been particularly active in lobbying for a legal technician licensure statute. (Ex. 111)

38. In May, 1992, the Board of Governors reviewed UPL cases pending against defendant Smith. The Board noted she did not feel she was in violation of the law, but the Bar's UPL Committee did. The BOG also noted the case was poorly suited for litigation because of its age and because no victtims had filed complaints. The

46. On December 6, 1993, Assistant Attorney General Lynn Rosik wrote an opinion to Robin Zelmer, Notary Public Complaints Investigator, concerning Mr. Somers' complaint and suggestion Defendant's conduct should lead to a revocation of Ms. Smith's Notary Commission. (Ex. 125)

47. At the March 11-12, 1994, BOG meeting the Board reviewed Defendant Smith's history with the UPL Committee and her role as an outspoken advocate of the independent paralegal or legal technician movement. After discussing the pros and cons of the matter at length, the Board voted, 9-5-1, to file injunctive suit to enjoin Defendants. (Ex. 136)

48. Holly Guardino needed legal services to transfer guardianship of her disabled brother from her mother to herself

49. The legal matter involving Guardiho included issues of venue, substitution of guardian, and notification.

50. Guardino contacted Defendants for assistance.

51. Guardino met with Robin Smith and disussed the individual facts and circumstances involved in her case.

52. On the initial consultation, Robin Smith asked Holly Guardino questions regarding the individual facts and circumstances involved in her legal matter.

53. Guardino told Smith that her mother was presently guardian for her brother and that they wanted to change the guardianship to Holly Guardino.

54. The existing guardianhhip was filed in Coos County where the ward resided befbre moving to Josephine County.

55. Holly Guardino resided in Washington County.

56. Guardino had no prcference as to where the guardianship would bc located.

57. Smith interviewed Guardino and wrote down on a questionnaire various facts and circumstances regarding Guardino's legal matter.

58. Defendants analyzed the facts and circumstances and advised Guardino to file for guardianship in Washington County.

59. Guardino had no idea what to do and relied upon Smith's advice.

60. Defendants selected the forms and provided the forms to have Holly Goardino appointed as guardian for her brother.

61. The forms included a Petition for Appointment of Guardian of Incapacitated Person and Waivers of Notice of Hearing on Petition for Appointment of Guardianship and Consent to Appointment.

62. Defendants drafted, prepared and completed the forms for Guardino.

63. Defendants listed Guardino's siblings as the persons entitled to notice in accordance withORS 126.127.

64. Defendants did not list the ward or the mother who was the current guardian as entitled to notice.

65. The ward and the current guardian are entitled to notice under Oregon law.

66. Defendants determined that the guardianship pleadings would be filed in Washington County Circuit Court, Probate Department.

67. The proper procedure was to file a motion in Coos County Circuit Court to transfer the guardianship to Josephine County and then to file a request to appoint a new guardian.

68. Defendants undertook to explain procedures to Guardino.

69. Defendants explained that the Court visitor from Washington County would go to Grants Pass to interview the ward.

70. Washington County notified Guardino that proper procedures were not being followed.

71. Guardino then retained Attorney Jeffrey W. Bellis to represent her.

72. Jeffrey W. Bellis wrote to Robin Smith and People's Paralegal on September 16, 1993, to advise them of the problem and to demand a reftuid of the fees paid by Guardino.

73. A copy of his letter was sent to the Probate Commissioner in Washington County and to the Oregon State Bar.

74. Guardino paid Defendants S199.25 for their services. It was returned.

75. Steven and Maurine Kalleck required legal services in order to dissolve their marriage.

76. Numerous issues were involved in their divorce including the division of pensions and retirement plans, the payment of support, wage withholding, children, property division and medical and dental coverage.

77. Steven Kalleck consulted with Defendants for legal assistance in obtaining a divorce.

78. Both Mr. and Mrs. Kalleck met with Defendants and discussed the facts and circumstances of their case.

79. Defendants analyzed the Kalleck's situation and advised them regarding procedures to be followed to obtain a divorce.

80. Defendants selected and provided the pleading forms for the Kallecks for the divorce.

81. Defendants drafted, and prepared various forms including a Property SettlementAgreement, a Decree of Dissolution of Marriage and Judgment, a Child Support Rebuttal, a Support Guideline Calculation, a Support Order Abstract, an Order Waiving Remainder of the

90-day Waiting Period, a Motion for Waiver of 90-day Waiting Period, an Affidavit Requesting Waiver of 90-day Waiting Period, Petitioner's Affidavit, Motion and Order for Def~t Decree of Dissolution, an Affidavit Supporting Decree of Dissolution Without a Hearing, and a Notice of Immediate Income Withholding and Option to Elect Form.

82. Defendants also prepared a Stipulated Qualified Domestic Relations Order under the Retirement Equity Act of 1984 (six pages) together with a Notice to Participant and Alternate Payee.

83. QUADRO Orders arc highly -acialiced legal documents and most domestic relations attorneys seek advice and assistance from a speciapst in order to prepare such orders.

84. Defendants inquired of the pension fizzid administrators regarding the pensions involved in the Kalleck divorce and obtained information used to prepare the QUADRO.

85. Defendants assisted the Kailecks in preparing a child support rebuttal.

86. Defendant Smith advised the Kallecks regarding the terms and provisions which should be stated in the child support rebuttal.

87. The Kallecks paid Defendants fees of at least $600.00.

88. Sheri Bolam sought legal services regarding the custody of her daughter.

89. Her daughter was born outof-wedlock in Arizona and the actual father had not been determined.

90. An Arizona citizen who might have been the father had previously threatened Bolam and the child.

91. Bolam had moved from Arizona and had been living in Oregon for about a year before she sought legal services.

92. Bolam consulted with Defendants regarding what should be done.

93. Defendants undertook to question Bolam about the individual facts and circumstances of her case.

94. Defendants undertook to analyze Bolam's legal situation and to determine her legal needs.

95. Defendants advised Bolam to file a petition for legal custody.

96. Defendants selected and provided the forms to be used regarding this custody matter.

97. Bolam relied upon the advice of Defendants in proceeding with filing a petition for legal custody.

98. Defendants drafted, prepared and provided forms including a Petition for Custody, Support and Visitation, an Affidavit, Motion and order for Default Decree, a Decree for Custody Support and Visitation, a Child Support Rebuttal, a Support Guideline Worksheet, an Affidavit and Motion for Decree Without a Hearing, a Support order Abstract, an Affidavit of Proof of Service and Summons for Domestic Relations.

99. Defendant stated in the Petition that paternity is not at issue, contrary to Bolam's statements.

100. Defendant Smith undertook to explain the term to Bolain and lead her to believe that the statement was legally necessary and correct.

101. The statement regarding paternity was subsequently changed by use of a different typewriter after Bolam had signed the petition and after it had been notarized, but without her knowledge.

102. Defendants arranged for the service of the pleadings upon Respondent in Arizona.

103. Respondent appeared, contested the matter, sought visitation and obtained visitation contrary to the desires of Bolam.

104. Both parties obtained attorneys to represent them in this matter.

105. Amy Elliott, Attorney at Law, represented Bolam and on August 5, 1994, wrote a letter of complaint to the Oregon State Bar (Unlawfiil Practice of Law Department) on behalf of Sheri Bolam.

106. Bolam paid fees to Defendants for their services.

107. Mr. and Mrs. Leonard needed legal services for the dissolution of their marriage.

108. Several issues were involve including property division, custody of children, visitation and support.

109. Mrs. Leonard consulted with Defendants to obtain assistance in dissolving the marriage.

110. Defendants met with both Mr. and Mrs. Leonard and asked them questions.

111. Defendants discussed the individual facts and circumstances involved in the marriage of Mr. and Mrs. Leonard.

112. Defendants analyzed the legal needs of Mr. and Mrs. Leonard dissolution of their marriage.

113. Defendants determined the procedures to be followed to obtain a dissolution.

114. Defendants selected and provided various legal forms and pleadings including a Decree of Dissolution of Marriage and judgment, a Support Order Abstract, a Certificate of Residency, a Petition for Dissolution of Marriage, an Affidavit Application for Decree, an Affidavit Requesting Waiver of 9O-day Waiting Period, a Motion for Waleer of 90-day Waiting Period.

115. Defendants drafted, prepared and completed these forms.

116. Defendants undertook to discuss and explain the terms and provisions and legal significance of these forms with Mr. and Mrs. Leonard.

117. Robin Smith assisted Annie Saltman in preparing a legal malpractice case against Henry Kane based upon an underlying medical malpractice case.

118. Defendant Robin Smith advised and assisted Annie Saltman in amending a complaint from a differeni case so that Ms. Sailman could file it against Mr. Kane.

119. Defendants research the law so that they may advise customers.

120. Defendants used the research to advise a customer regarding the transfer of a trusteeship in Oklahoma.

121. Defendants explained to customers A/B Trusts.

122. Defendants advise customers who want to file probate that they need not do so in certain circumstances.

123. Defendants advise customers that an Affidavit of Attesting Witnesses is necessary for the court to accept a Willl in probate.

124. Defendants select deed forms for customers based upon what Defendants believe the "court requires."

125. Defendants discuss the advantages and disadvantages of living trusts with customers.

126. Defendants explain to customers what debts can and cannot be dischged in Chapter 7 bankruptcy.

127. Defendants tell customers that CSD has to be notified in adoptions.

128. Defendants explain homestead exemptions to customers interested in bankruptcy.

129. Defendants copy Statutes and case law and provide them to customers for their individual circumstances.

130. Defendants explain to customers the differences between preparing a new will and doing a codicil.

131. Defendants inform customers that assets have to be transferred in order to make a living trust effective.

132. Defendants advise customers regarding the proper jurisdiction for litigation including the jurisdictional amounts for District and Circuit Courts.

133. Defendants provide legal services to customers in various areas including adoptions, bankruptcies, incorporations, expungements, domestic relations, name changes, guardianships, conservatorships, wills, powers of attorney, health are forms, living trusts, deeds, probate proceedings and general litigation.

134. Robin Smith has an associates degree as a legal assistant from Portland State University.

135. People who buy kits from Defendants oftentimes come back to discuss forms and procedures.

136. Defendants explain forms and procedures to persons who have purchased kits.

137. Defendants furnish other forms for such purchasers or prepare new forms selected by Defendants for such persons.

138. Customers often have questions after forms have been prepared.

139. Defendants undertake to answer customers' questions.

140. Defendant Smith shares her knowledge of the law and of legal procedures with her ustomers.

141. Defendants determine proper venue or place of filing for customers.

142. Defendants determine proper service requirements for some customers.

143. Defendants try to take control of the initial conversation with customers, rather than allowing customers to state what services they desire and what information should be used in their particular legal matter.

144. The Oregon State Board of Governors authorized the filing of this suit against Defendants after notification of the Gifford matter.

145. The Board of Governors voted to seek to enjoin Defendants from the unlawfiil practice of law based upon the f~cts and circumstances involved in the Gifford matter.

146. The Gifford matter was investigated by the UPL Comniittee of the Oregon State Bar.

147. The UPL Committee recommended to the Board of Governors that this suit be filed to enjoin Defendants from the unlawfiil practice of law.

148. The Oregon State Bar has rules and procedures for the investigation and prosecution of UPL matters.

149. The Oregon State Bar followed its rules and procedures for the investigation and filing of this matter.

150. This suit for injunctive relief was filed by the Oregon State Bar in less thantwo years from April 7, 1993, when the Bar was first notified of the Gifford matter.

151. The Guardino, Kalleck, Bolam, and Leonard matters all arose within two years of the filing of this suit.

152. The Oregon State Bar did not file this suit due to any exercise of Defendant's right to freedom of speech.

153. The Oregon State Bar has not filed this suit or maintained this litigation against Defendants due to any invidious disciiminatory reason or due to Defendants' vocal participation in

any effort to license paralegals or due to Defendants' lobbying the legislature or seeking the passage of an initiative.

154. The Oregon State Bar has not singled out Defendants for injunctive litigation while others simlarly situated have been ignored.

155. Defendants have been on notice since at least January, 1992, that the Oregon State Bar considered Defendants' activities to constitute the unlawfbl practice of law.

156. Defendants have not changed theirpractices in their business substantially since January, 1992.

157. The Oregon State Bar did not hold off maintaining this injunctive suit against Defendants to gain an advantage over Defendants.

158. The Oregon State Bar at times notifies other agencies and courts regarding complaints against persons allege to be engaged in the unlawfiai practice of law.

159. The rules and procedures for the processing of UPL matters contemplate notification of other agencies.

160. The Oregon State Bar did not follow through with a prior suit against Defendants because the matters became stale.

161. The Oregon State Bar never advised Defendants or led Defendants to believe that their conduct was not the practice of law.

162. The Oregon State Bar has rules and standards for the disposition of cases.

163. The Oregon State Bar followed its rules and standards regarding the disposition of the cases against these Defendants.

164. The Oregon State Bar did not file or maintain this suit against Defendants based upon such factors as race, religion, color, creed, national origin, exercise of constitutional rights, or similar invidious reasons.

165. Defendants are practicing law unlawlllly in Oregon and unless enjoined, will continue to do so.

166. Generally, complaints of UPL come to the Bar's Disciplinary Counsel's office. That office decides whether to recommend those claims be reviewed by the UPL Committee. Claims referred to the UPL Committee from 1989 to 1994, range

from a low of thirty-three (1989) to a high of sixty-seven (1992). Some claims are dismissed, some claims are resolved by letters of admonitions, and other claims are resolved by cease and desist letter agreements. The percentage of claims which were sent to the Board of Governors by the UPL Committee requesing prosecution from 1989 to 1994 range from four to six percent of the total claims presented to the UPL Committee. (Ex. 154)

167. From 1989 to April 27, 1995, ten lawsuits were filed or contempt proceedings were instituted by the Oregon State Bar for UPL. (The Board of Governors has authorized a lawsuit against Diana Nelson, but no suit had been filed at time of trial.) Of the ten lawsuits pending during this time frame, four were resolved by stipulated injunctions; at the time of trial in this case, another case had a stipulated injunction pending. In three of the other cases, stipulated injunctions had earlier been entered which subsequently led to contempt proceedings. The only case which acally went to trial, from 1989 to April, 1995, for injunctive relief is this case. (Ex. 8)

168. The only person, other than Defendants, identified by any of Plaintiff's witnesses as 'eing an open and vocal advocate for change of the UPL statutes in Oregon as Defendants, was kewise sued by the Oregon State Bar pursuant to ORS 9.160 et seq

169. Mr. Sapiro had never been instructed by the BOG to meet with an accused in a UPL case before being so instructed in this case.

170 All conduct of the UPL Committee and its members, and the Board of Governors wid its members, were within the scope and course of their authority of the Oregon State Bar.

171 No non-lawyer has ever filed a complaint of UPL with the Oregon State Bar against Defendants.

172 A significant number of people cannot afford legal services in this state and some of heir legal needs are not being met by the members of the Oregon State Bar.

173. The Oregon State Bar has acted in good faith in this case.

Based on the FINDINGS OF FACT, the Court enters the following CONCLUSIONS **)OF LAW:**

Defendants are unlawfully practicing law in violation of ORS 9.160.

2. These illegal acts and practices of Defendants, and each of them, are continuing and onstitute a present and serious risk of injury and hain, financial and otherwise, to the citizens of the State of Oregon.

3The Oregon State Bar asserted its claims against Ms. Smith and People's Paralegal Service, Inc. in a reasonable amount of time following knowledge of complaints against Defendants and Defendants have not been substantially prejudiced by any delay.

4. The Oregon State Bar is not barred from bringing this suit by the doctrine of laches or equitable estoppel.

5. The law's restrictions upon Defendants' business activities, to the extent they may affect Defendants' speech' are not broader than necessary to serve the intereit of the public, and an injunction prohibiting Defendants from engaging in the practice of law will not violate defendants' rights of free speech as guaranteed by the First Amendment of the United States Constitution or by Article I, Section 8 of the Oregon Constitution.

6. The definition of what constitutes the practice of law as provided by the Oregon Supreme Court is not vague and does not violate Defendants' right of due process of law under the Fourteenth Amendment to the United States Constitution or Article I, Section 10 of the Oregon Constitution.

7 An injunction will not violate Defendants' right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution or Article 1' Section 20 of the Oregon Constitution.

8. A decree and injunction should be issued to strictly enjoin Defendants, and each of them, directly or indirectly, or through any business, corporation or subsidiary or as a director, officer, employee, agent or otherwise, from practicing law.

9. Plaintiff should be awarded costs and disbursements including reasonable attorney's fees incurred herein.

DISCUSSION

Only a member of the Bar can bring knowledge of the law and legal advice to the aid of a lient While any person can act pro se, only a member of the Bar can represent another.

In the circumsance in which a person proceeds pro se the person alone brings knowledge of the law to bear. If the person has none, none can be gained from someone who is not a meember of the Bar. The person who proceeds pro se must "practice all the law", though they can uy and utilize forms. These forms can be legally sold. Defendants undertake to do so. However, while Defendants can legally offer and sell forms, the pro se must determine which forms are appropriate. Defendants violate the law by in making this determination.

Just as anyone can sell forms, anyone can legally type forms. But the typist cannot supply the words and phrases and sentences to be typed. Only a lawyer as the pro secan. Defendants violate the law by doing so.

People who know nothing about the law seek help and advice from Defendants. Defendants provide it. Doing so is illegal and will be enjoined.

Ms. Smith contends that her customers need her help. She may often be right, though she has done great harm to some of her customers. But customer need is not a defense to the statute. The legislature can change the statute if it agrees with Ms. Smith. So far it has not.

The Bar was lackadaisical in investigating and prosecuting suit against Defendants. 'Defendants argue that this unfortunate failure of the Bar to protect the public sooner deprives the Bar of its ability to do so now. Defendants are wrong: The Bar's faillure does not license Defendants.

Defendants also imply that the Bar is prosecuting them not fbr unlawful practice of law, but because of Ms. Smith's advocacy of allowing trained paralegals to deliver legal services directly to people who need their service. Part of the Bar's faiilure to act sooner may have included concern about how such a prosecution may be viewed. The Bar is now prosecutmg Defendants becuse people have suffered through Defendant's illegal practice of law.

Defendants correctly point out that the Bar failed to notify the Attorney General prior to commencing this suit. Failure to do so does not deprive this court of jurisdiction.

Defendants raise other issues. They do not merit discussion on and my writing on them would not enlighten or help appellate courts or others.

DATED this 24th day of May, 1995

s/_____
MICHAEL J. MCELLIGOTT
CIRCUIT COURT JUDGE

PETITION FOR WRIT OF CERTIORARI

Appendix E

IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

OREGON STATE BAR, a public corporation, Plaintiff,	) No. C94-0597CV
ROBIN S. SMITH, and PEOPLE'S PARALEGAL SERVICE, INC., an Oregon Corporation Defendants.	) JUDGEMENT AND DECREE) PERMANENT) INJUNCTION

The above-entitled matter came before the Court for trial on April 20, April 21, April 26 and April 27, 1995 before the undersigned Judge. Plaintiff, Oregon State Bar, appeared through Jeffrey Sapiro and its attorney, Allen Reel, Special Counsel. Defendant Robin S. Smith appeared in person and on behalf of People's Paralegal Service, Inc., and with their attorney, Gary V. Abbott.

The attorneys made opening statements on behalf of their respective clients, introduced testimony and other evidence in support of their respective cases, and submitted closing arguments and proposed findings in writing. Thereafter, the Court made its Findings of Fact and Conclusions of Law in favor of plaintiff on May 24, 1995. Now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants,

and each of them, directly or indirectly, or through any business, corporation, or subsidiary, or as a director, officer, employee, agent, orotherwise be and hereby are strictly and permanently enjoined from practicing law including:

1. Enjoined from any personal contact with any persons in the nature of consultation, explanation, recommendation, or advice regarding their legal matters.

2. Enjoined from meeting with any persons to discuss their individual facts and circumstances relating to their need or desire for legal forms, legal services or legal assistance.

3. Enjoined from obtaining information orally, in writing, or in any other manner relating to individual facts and circumstances so as to assist any persons with their legal matters.

4. Enjoined from advising any persons regarding their eligibility for or advisability of legal remedies to address any person's particular legal matters.

5. Enjoined from advising any persons regarding procedural functions~of the court system as it relates to any person's particular legal matters including advice regarding jurisdiction or venue.

6. Enjoined from assisting in selecting particular forms, documents or pleadings for any persons to address their legal matters.

7. Enjoined from assisting in any way with the preparation or filling out of legal forms, or any parts of such forms,

d ocuments or pleadings for any persons.

8. Enjoined from assisting, suggesting or advising any persons how to forms, documents or pleadings should be used to address or to solve particular legal problems.

9. Nothing included in this Judgment and Decree precludes Defendant Smith from working for someone authorized to practice law so long as she is acting within the course of her duties and under the direction and supervision of an individual authorized to practice law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff is awarded judgment against defendants, and each of them, for its costs and disbursements and attorney's fees incurred herein, in an amount to be determined under ORCP 68C.

DATED this 14th day of June, 1995.

s/_____
Michael J. McElligott
Circuit Court Judge

Prepared and submitted by

s/_____
Allen Reel (OSB #74267) Special Counsel to Oregon State Bar

PETITION FOR WRIT OF CERTIORARI

Appendix F

IN THE SUPREME COURT OF THE
STATE OF OREGON

OREGON STATE BAR, a public Corporation, Respondent on Review	) Trial Court No. C94-0597CV
v.	)
ROBIN S. SMITH, and PEOPLE'S PARALEGAL SERVICE, INC. an Oregon Corporation, Petitioners on Review	) CA No. A89206

PETITION FOR REVIEW OF ROBIN S. SMITH and PEOPLE'S PARALEGAL SERVICE, INC

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for the County of Washington, Honorable Michael J. Mc Elligott, Circuit Court Judge Opinion Filed, July 9, 1997.

Affirmed.
Author of Opinion: Haselton, Judge
Concurring Judges: Deits, Chief Judge, Richardson, Senior Judge

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COPY OF COURT OF APPEALS DECISION A-1

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PRAYER FOR REVIEW

Petitioners petition this Court to review the opinion of the Court of Appeal unanimously affirming the judgment of the Circuit Court upholding the constitutionality of ORS 9.160 and of the injunction against petitioners issued pursuant thereto. Petitioners pray this court reverse the decision of the court of appeals, declare ORS 9.160 unconstitutional insofar as it bans the historically free exchange of out-of-court legal advice between Oregon citizens, and Vacate the injunction of the Circuit Court.

QUESTIONS PRESENTED ON APPEAL

1. Whether ORS 9.160 violates Article I, section 8 (Art. I, sec. 8) of the Oregon State Constitution insofar as it prohibits nonlawyer citizens from the historically free exchange of legal advice and information with one another.

2. Whether the injunction decreed by the trial court is unconstitutionally overbroad in banning petitioners not only from statutorily unauthorized practice of law but also from all those forms of practice of law permitted by the state to all nonlawyer citizens of Oregon.

PROPOSED RULE OF LAW

Petitioner proposes, if review is allowed, that this Court recognize that personalized, out of court legal advice was freely exchanged by nonlawyer citizens in all states and in the Oregon Territory up to and well beyond the adoption of the Constitution of Oregon in 1859.

Petitioner proposes that this Court establish as a rule of law that such communication of legal advice between nonlawyer citizens is subject matter speech which is protected by Art. I, sec. 8 and cannot be prohibited absent constitutional amendment by the state of Oregon or its legislature.

REASONS FOR REVERSAL

1. The Court of Appeals erred in holding that the ORS 9.160 ban on nonlawyer citizens exchanging out of court legal advice does not violate the Constitutional protection of historically free speech provided by Art. I. sec. 8 of the Oregon Constitution. Legal advice is speech on a subject matter, protected from legislative prescription by Art. I, sec. 8 of the Oregon Constitution. The exchange of out of court legal advice was never regulated or prescribed prior to the adoption of the Oregon Constitution.

The terms of Oregon's unauthorized practice statute, ORS 9.160, ban out of court legal advice, regardless of its effects, whether good or bad, whether the advice is correct or incorrect. Therefore the statutory prohibition of such speech is unconstitutional and the Court of Appeals conclusion to the contrary should be reversed. State v. Stoneman 323 Or. 536, 920 P.2d 535 (1995); State v. Robertson 293 Or. 402, 649 P. 2d 569 (1982).

2. The Court of Appeals erred in finding constitutional the Circuit Court's injunction, which banned petitioners not only from engaging in unauthorized practice of law but also banned petitioners from engaging in those forms of law practice which all nonlawyers are expressly authorized or implicitly permitted to practice.

The injunction's inclusion within its ban those forms of law practice which the state authorizes nonlawyers to practice violates federal First Amendment guarantees in that there is no compelling interest in the state's banning petitioners from the practice of law which the state authorizes nonlawyers to practice. cf. Zauderer V. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471.S.Ct. 626, 629 (1985), United Transportation Union V. State Bar of Michigan 401 U.S. 576 (1971); Brotherhood of Railroad Trainmen V. Virginia 377 U.S. 1 (1964)

STATEMENT OF FACTS

The opinion of the Court of Appeals correctly states the facts of this case, with the sole exception that it fails to note that the Circuit Court injunction bans petitioners not only from the unauthorized practice of law, but from all practice of law, including the myriad forms of law practice which the state authorizes all nonlawyers to practice, e.g.. practice before justice courts, practice before state agencies, etc.

ARGUMENT

A. THE COURT OF APPEALS ERRED IN HOLDING ORS 9.160 CONSTITUTIONAL

The unauthorized practice of law statute, ORS 9.160 is an absolute ban on the free exchange of legal advice between nonlawyers in Oregon. Art. I, sec. 8, of the Oregon State Constitution prohibits the government, with few historical exceptions, from"... restricting the right to speak, write, or print freely on any subject whatever.. .1. ORS 9.160 is a governmental enactment that, on its face, absolutely prohibits the free exchange of certain subject matter speech. The speech prohibited by the statute was not proscribed historically, and the prohibition is therefore unconstitutional under any coherent reading of Art. I, sec. 8.

The Oregon Supreme Court has spoken clearly in State v. Spencer, 289 Or. 225, 611 P.2d 1147, 1148 (1980), State v. Robertson, 293 Or. 453, 649 P.2d 569, *576* (1982), and their

1 Article I, section 8 of the Oregon Constitution provides:

No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

progeny, that the words of Art. I, sec. 8, mean what they say, and that" ... [i}f a law concerning free speech on its face violates this prohibition, it is unconstitutional; ...." Spencer 611 P~ 2d at 1148. This well settled approach mandates two lines of inquiry which conclusively determine the governmental enactment at hand, ORS 9.160, is facially unconstitutional.

The first line of inquiry tests whether the unauthorized practice of law statute absolutely banning the free exchange of legal advice between nonlawyers is a governmental enactment that on its face restrains the free expression opinion" or restricts the "right to speak" on any subject whatever. Robertson, 293 Or. at 412, 649 P. 2d at 576 (quoting State v. Spencer 611 P.2d at ~ 299 Or. 691,695,705 P. 2d 740,743-44(1985). A governmental enactment restricts freedom of expression and the right to speak when it is directed at the act or subject of any communication rather than some defined injury. Spencer, 611 P. 2d at 1148; State v. Plowman, 314 Or. 157, 164, 838 P. 2d 558, 562 (1992). Governmental enactments within this category violate Art. I, sec. 8, unless the second line of inquiry indicates the restraint can be wholly confined within one of the few well established historic exceptions. State v. Blair, 287 Or. 519, 601 P. 2d 766, 768 (1979) (statute that in its own terms forbids speech is vulnerable to constitutional attack on its face).

Unquestionably, ORS 9.160, as interpreted by the Oregon Supreme Court, proscribes expression about any subject or the act of communication. The statute reads:

> Except for the right reserved to litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar.
>
> ORS 9.160.
>
> The Oregon Supreme Court has defined the practice of law as: -_ [A]ny exercise of an

intelligent choice, or an informed discretion in advising another of his legal rights and duties, Oregon State Bar v. Security Escrows Inc. 377 P. 2d 334, 339 (1962); see also Oregon State Bar v. John H. Miller & Co. 385 P. 2d 181, 182 (1963); Oregon State Bar v. Gilchrist 538 P. 2d 913, 919 (1975); Oregon State Bar v. Write, 280 Or. 693, 573 P. 2d 283, 286 (1977).

The statute does not require the communication to cause any adverse consequence or effect on the listener. All it requires is that a nonmember of the bar communicate on the subject prohibited. Unless it can be wholly confined within some well excepted historic exception, ORS 9.160 violates Art. I, sec. 8.

As the opinion of the Court of Appeals clearly demonstrates in its review of the history of the regulation of law practice in Oregon (Opinion, pp.5-18), the free out of court exchange of legal advice between citizens was not subject to any governmental prohibition until long after the adoption of Art. I, sc. 8 of the Oregon Constitution. ("During territorial times and for the first 60 years of Oregon's statehood, restrictions on the practice of law were minimal.... The restrictions that were imposed pertained solely to litigation practice -- that is to qualifications to appear before courts and to sign pleadings. There were few, if any, restrictions on the restrictions of general out-of-court legal advice." (Opinion pp.5-6).

In Oregon, because communication on any subject is constitutionally privileged unless there is an historical exception, speech can only be regulated incidentally by laws which proscribe some real and objectively harmful effect likely to follow from certain words at the time and place they are uttered. City of Portland v. Tidyman, 306 Or. at 188, 759 P.2d at 249. ORS 9.160 is plainly a governmental restraint on speech that does not specify the harmful effect objectively likely to follow from the exchange of legal advice between nonlawyers. Whether or not particular

nonlawyer legal advice is correct and beneficial or is incorrect and harmtul, it is all banned without regard to effect.

As stated in Robertson historically free speech cannot be banned by the legislature simply because such speech is deemed undesirable or is thought to have adverse consequences. ORS 9.160 reflects nothing more than a generalized governmental apprehension of the free exchange of legal advice between nonlawyers and a complete ban regardless of effect on all such speech.

The Court of Appeals erroneously concludes that "ORS 9~ 160 is not "written in terms directed to the substance of any "opinion" or any subject of communication. " Opinion, p.20. The opinion further erroneously concludes that ORS 9.160" is expressly directed to limiting the conduct of a professional ...." Opinion, p.20. However, the only express direction of ORS 9.160 is that law not be practiced. The statute does not expressly use either the word "conduct" or the word "speech". It expressly bans "practice", and legal advice communicated from one person to another is the practice of law. That legal advice is speech, and that ORS 9.160 is written in terms that ban such speech between nonlawyers, is self evident. It can only be noted, not argued. While the Court of Appeals asserts that the practice of law is "conduct,"it nowhere gives any example of law practice that is conduct but not speech. The court refers to legal research and analysis as examples of "services" that are not speech. However, research and analysis are not the practice of law. When law students or even undergraduates research the law, they are not practicing law. It is only when the results of research or analysis are personalized and communicated through speech to another that law is being practiced. Whether the practice of law includes conduct that is not speech is doubtful; however such is not the issue. Out of court legal advice to another is both speech and the practice of law and being such it is expressly prohibited by the legislature and

expressly protected by Art. I, sec. 8. The dilemma cannot be escaped by calling speech conduct."

B. THE INJUNCTION AGAINST PETITIONERS IS UNCONSTITUTIONALLY OVEREROAD

Legal advice is fully protected speech under the First Amendment to the United States Constitution. As such it cannot be intruded upon absent a compelling government interest. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio 471 5. Ct. 626 (1985); United Transportation Union State Bar of Michigan 401 U.S. 576 (1971); Brotherhood of Railroad Trainmen v. Virginia 377 U.S. 1(1964). The state of Oregon has approved myriad forms of law practice by nonlawyers, e.g. practice in justice of peace courts, ORS 52.060; practice in small claims court with consent of the court; before certain state agencies, etc. Given that the state, having approved such nonlawyer practice of law by any of its citizens, the state cannot demonstrate any compelling interest in enjoining petitioners from also engaging in such authorized nonlawyer law practice. By failing to limit the injunction to those forms of law practice which only licensed attorneys are permitted to practice, the injunction is unconstitutionally overboard in that its injunctive ban extends to protected speech with no compelling interest furthered by such extension.

REASONS FOR GRANTING REVIEW

1. The constitutionality of an important statute is presented by this case. (Rule 9.07 (1) (c))2. The constitutional challenge herein presents a question of state constitutional law rule 9.07 (4))

3. The constitutional challenge herein presents an issue which is one of first impression for this Court. rule 9.07 (5)). While a constitutional challenge to ORS 9.160 was presented in State Bar of Oregon v. Wright, 280 Or. 693, 573 p. 2d 283 (1977), the challenge was one of vagueness, not free speech, and was a challenge to prohibition of representation in the courtroom. It did not involve historically free speech such as the out of court legal advice at issue herein.

4. The facts of this case are simple and undisputed, presenting a clear and appropriate record for resolution of the issues presented. rule 9.07, (7)).

5. Many people are affected by the correctness, or lack thereof, of the decision of the Court of Appeals in this case. rule 9.07 (3)). There is a burgeoning independent paralegal movement in the United States, acting in response to the unmet needs of many citizens. As found by the Circuit Court in this case, substantial numbers of Oregon citizens cannot afford or otherwise obtain the services of an attorney when needed; some 9000 legal matters were brought to petitioners alone prior to being enjoined.

6. The interpretation of Art.I, sec. 8 as applied to ORS 9.160 is a significant issue presented by this case. rule 9.07 (a)). Further, the opinion of the Court of Appeals demonstrates the need for a clarifying interpretation of Art. I, section 8 as applied to historically protected out of court legal speech. The opinion of the Court of Appeals obviously found difficulty in applying this Court's Art. I, sec. 8 precedents to the case herein. The opinion finds these precedents an "awkward fit." Opinion, p.19. It notes that the analysis required by this court's precedents seem "somewhat ill-suited" in assessing the constitutionality of statutes such as ORS 9.160. Opinion, p.19. Further, the court of appeals indicates that this court's precedents "unfortunately" foreclose the ability to "carve out" a needed, or at least a "tempting" "fourth

category" for analysis in applying the protection of Art I., sec. 8 to a licensing statute such as ORS 9.160. Opinion, p.23. While petitioners assert the opinion of the Court of Appeals has misapplied these precedents, even if the opinion were free of error, it's discomfort with precedential requirements calls for review.

Any fair reading of the opinion of the Court of Appeals reveals the opinion's obvious strain in fitting the Art. I. sec.8 precedents of this Court to the ORS 9.160 challenge represented herein. Given the importance of the issue presented and the fact that this is a case of first impression, a clarifying opinion from this Court would provide a better resolution than an opinion which finds "awkward" fits and "unfortunate" limitations in ill-suited" precedents.

CONCLUSION

For the reasons set forth above, petitioners respectfully request this court to review thedecision of the court of appeals.

Respectfully
Submitted,

s/_____

Stuart A.
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OSB #92137
Attorney for
Petitioners

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for Review upon the following individual, by mailing to said individual two true copies thereof; certified by me as such, contained in a sealed envelope, with postage prepaid, addressed to said individual at said individual's last known address, to-wit:

Allen Reel, Special Counsel
Oregon State Bar
P.O. Box 1609
Beaverton, OR *97075*

and deposited in the United States Post Office at Portland, Oregon on the 10th day of September,
1997

Stuart A Sugarman, OSB #92137
Attorney for Petitioners

(3)

Supreme Court, U.S.
FILED

No. _____ 971122 JAN 5 - 1998

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1997

*

ROBIN SMITH,
Petitioner,

v.

OREGON STATE BAR,
Respondent.

*

Petition For Writ of Certiorari
To the Oregon Supreme Court

*

PETITION FOR WRIT OF CERTIORARI

Appendix Part 2

*

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67 pp

PETITION FOR WRIT OF CERTIORARI

Appendix G

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

OREGON STATE BAR, a public corporation, Plaintiff-Respondent,	) Trial Court No.
v.	) C94-0597CV
ROBIN S. SMITH, and PEOPLE'S PARALEGAL SERVICE, INC., an Oregon Corporation	) Appellate Court no.) CA-A89206
Defendants, Appellants	)

Appeal from the Judgment of the Circuit Court
for the COUNTY OF WASHINGTON
Honorable MICHAEL J. MCELLIGOTT, Judge

APPELLANTS' BRIEF AND ABSTRACT OF RECORD

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Statement of the Case

A. Nature of the Action

The Oregon State Bar filed a complaint for injunctive relief against Robin S. Smith and People's paralegal Services, Inc., alleging defendants engaged in the unlawful practice of law in violation of ORS 9.160, seeking a permanent injunction against providing any legal advice.

B.Nature of the Judgment

After trial before the court, the court permanently enjoined defendants against providing any legal advice

C. Appellate Jurisdiction This court has jurisdiction pursuant to ORS 19.023,19.026, 19.029, 19.023.

D. Effective Dates

The injunction was entered on June 14, 1995, and the notice of appeal was served and filed on July 10, 1995.

E. Questions presented on Appeal

1. Whether ORS 9.160 as interpreted by the Supreme Court of Oregon violates Article I, section 8 (Art. I, sec. 8), of the Oregon State Constitution.

2. Whether the injunction decreed by the trial court is unconstitutionally overbroad and invalid under the Due Process guarantees of the Fourteenth Amendment and First Amendment of the United States Constitution.

F. Summary of Arguments

1. ORS 9.160, the unauthorized practice of law statute, as interpreted, proscribes the out of court exchange of legal advice between nonlawyer citizens of Oregon Historically, there was no prohibition on the exchange of legal advice and assistance between citizens Personalized, out of court legal advice was freely exchanged by nonlawyer citizens in all states and in the Oregon Territory up to and well beyond the adoption of the Constitution of Oregon in 1859. In that ORS 9.160 has been consistently interpreted by the Supreme Court of Oregon to ban out of court legal advice by nonlawyers, the statute is both facially and as applied herein an unconstitutional ban on the content of speech in violation of Art. I, sec. 8 of the Oregon Constitution.

2. The trial court's injunction bans Ms. Smith from engaging in any form of legal advice and practice. In doing so, it sweeps within its proscription the many forms of law practice that the state or federal government permit to any nonlawyer. Both expressly and by necessary implication the state legislature has authorized numerous forms of nonlawyer practice, including practice before certain courts and many administrative agencies. Because nonlawyer representation before these bodies is permitted, the substantive, procedural, and evidentiary legal advice necessary to such representation is also permitted. In addition to state authorization, the United States has authorized many forms of federal law

practice by nonlawyer Oregon citizens. The trial court injunction is unconstitutionally overbroad in banning government authorized forms of law practice. Because even the legal profession itself has great difficulty in determining which forms of nonlawyer law practice are authorized and which are not, the trial court's injunction cannot be cured of its overbreadth without becoming void for vagueness.

G. Facts of the Case

Citizens in Oregon and in the rest of the United States and its territories were historically free to give and receive legal advice without interference or restriction by the government. Local and federal government may have, in varying degree, regulated who could act in a representative capacity in various courts and who could hold oneself out as an attorney qualified to practice before the courts. However, from the founding of the nation to the adoption of the Oregon Constitution, there existed no government restriction on out of court legal speech between citizens. Nonlawyer citizens freely advised and assisted one another on legal matters. State restrictions on out of court speech whether legislative or judicial, were adopted only in the twentieth century.

Robin S. Smith and her company, People's Paralegal Services, Inc., defendants below and appellants herein, from July 1, 1987 until enjoined herein assisted some 9,000 citizens on pro per legal matters. Findings of Fact, No. 9 (A.1). Neither Ms. Smith nor her company's employees held

themselves out as attorneys. They advised those they assisted they were not attorneys. Findings of Fact, Nos. 7, 8 (A.1). Many citizens of Oregon have serious need for the types of legal services provided by Ms. Smith but cannot obtain such services from attorneys licensed by the Oregon State Bar. Finding of Fact, No. 172 (A.1).

I. Assignments of Error

A. THE COURT ERRED IN HOLDING THE PROHIBITIONS OF ORS 9.160 CONSTITUTIONAL

ORS 9.160, the unauthorized practice of law statute, is an absolute ban on the free exchange of legal advice between nonlawyers in Oregon. Art. I, sec. 8, of the Oregon State Constitution prohibits the government, with few historical exceptions, from "... restricting the right to speak, write, or print freely on any subject whatever . . . . ORS 9.160, is a governmental enactment that, on its face, absolutely prohibits the free exchange of certain subject matter speech. The speech prohibited by the statute was not proscribed historically, and is therefore unconstitutional under any coherent reading of Art. I, sec. 8.

The Oregon Supreme Court has spoken clearly in State v. Spencer, 289 Or. 225, 611 P.2d 1147, 1148 (1980), State v.

Article I, section 8 of the Oregon Constitution provides:

> No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.

Robertson, 293 Or. 453, 649 P.2d 569, 576 (1982), and their progeny, that the words of Art. I, sec. 8, mean what they say, and that "[i]f a law concerning free speech on its face violates this prohibition, it is unconstitutional Spencer, 611 P.2d at 1148. This well settled approach mandates two lines of inquiry which conclusively determine the governmental enactment at hand, ORS 9.160, is facially unconstitutional.

The first line of inquiry tests whether the unauthorized practice of law statute absolutely banning the free exchange of legal advice between nonlawyers is a governmental enactment that on its face restrains the "free expression of opinion" or restricts the "right to speak" on any subject whatever. Robertson, 293 Or. at 412, 649 P.2d at 576 (quoting State v. Spencer, 611 P.2d at 1148); see also, State v. Moyle, 299 Or. 691, 695, 705 P.2d 740, 743-44 (1985). A governmental enactment restricts freedom of expression and the right to speak when it is directed at the act or subject of any communication rather than some defined injury. Spencer, 611 P.2d at 1148; State v. Plowman, 314 Or. 157, 164, 838 P.2d 558, 562 (1992). Governmental enactments within this category violate Art. I, sec. 8, unless the second line of inquiry indicates the restraint can be wholly confined within one of the few well established historic exceptions. State v. Blair, 287 Or. 519, 601 P.2d 766, 768 (1979) (statute that in its own terms forbids speech is vulnerable to constitutional attack on

its face).

For example, the Spencer Court voided the former Oregon disorderly conduct statute which prohibited the expression of "abusive or obscene language ... in a public place; ..." if accompanied with "intent to cause public inconvenience, annoyance or alarm " (former) ORS 166.025 (1)(c). The Spencer Court observed the statute made the "speaking of the words themselves criminal, if spoken with the requisite intent, even if no harm was caused or threatened." Spencer 611 P.2d at 1148. Thus, it concluded "when the terms of a statute as written prohibit or restrain expression" that does not come within the historical exception of Art. I, Sec. 8, it is unconstitutional. Spencer, 611 P.2d at 1149. See also, Moser v Frohnmayer, 315 Or. 372, 376, 845 P.2d 1284, 1286 (1993) (statute prohibiting use of automatic dialing and announcing device to solicit purchase of realty, goods or services, not valid on basis it proscribed speech and not harmful effects of automated telephone solicitation); State v. Henry, 302 Or. 510, 515, 732 P.2d 9, 11 (1987) (law against disseminating obscene material invalid on basis it was written in terms proscribing content of historically privileged speech not effect); City of Portland v Tidyman, 306 Or. 174, 184, 759 P.2d 242, 247 (1988) (land use statute invalid because it distinguished businesses on basis of content of "adult" materials sold not actual effect of trade); State v. Blair, 287 Or. 519, 601 P.2d 766 (1979) (harassment statute

forbidding some types of telephone calls constitutionally inadequate because it did not require an "effect" on the listener). The clear rule is that statutes which restrain speech but do not make an actual, concrete, completed harm the focus of its prohibition have been uniformly struck down unless the governmental enactment can be wholly confined within some historical exception.

Unquestionably, ORS 9.160, as interpreted by the Oregon Supreme Court, proscribes expression about any subject or the act of communication. The statute reads:

> Except for the right reserved to litigants by ORS 9.320 to prosecute or defend a cause in person, no person shall practice law or represent that person as qualified to practice law unless that person is an active member of the Oregon State Bar.

ORS 9.160

The Oregon Supreme Court has defined the practice of law as:

> ... [Any exercise of an intelligent choice, or an informed discretion in advising another of his legal rights and duties, ...

Oregon State Bar v. Security Escrows, Inc., 377 P.2d 334, 339 (1962); see also, Oregon State Bar v. John H. Miller & Co., 385 P.2d 181, 182 (1963); Oregon State Bar v. Gilchrist, 538 P.2d 913, 919 (1975); Oregon State Bar v. Wright, 280 Or. 693, 573 P.2d 283, 286 (1977).

Read together, this governmental enactment absolutely prohibits the free exchange of legal advice between nonlawyers in Oregon The statute does not require the communication to cause any adverse consequence or effect on the listener. All it requires is that a nonmember of the bar communicate on the

subject prohibited. Unless it can be wholly confined within some well excepted historic exception, ORS 9.160 violates Art. I, sec. 8.

The second line of inquiry tests whether the party defending the unauthorized practice of law statute, enacted during the Great Depression era, can prove it may be wholly confined within some well established governmental prohibition in existence when the early American guarantees of freedom of speech were adopted, and that these early American guarantees of freedom did not intend to liberate it. Robertson, 649 P.2d at 576. Examples of well established conventional crimes the early guarantees of freedom of expression were not intended to abolish are fraud, perjury, extortion, solicitation, and the attempting, carrying out, or concealing of crimes. Id.; see also, State v. Henry, 302 Or at 515, 732 P.2d at 11. Where, as here, the party defending the governmental enactment cannot satisfy the heavy burden of proving an historical exception, the governmental enactment, on its face, violates Art. I, sec. 8.

For example, the Henry Court had to determine if "obscene" speech should be made an historical exception to the absolute terms of Art. I, sec. 8. It concluded that "restrictions on sexually explicit and obscene expression between adults were not well established at the time of the adoption of Article I, section 8." State v. Henry, 302 Or. at 523, 732 P.2d at 16. But the Henry Court reached this

conclusion despite the fact that the Oregon Codes of 1853 and 1855 both contained a similar provision criminally proscribing the dissemination of obscene writings or pictures. To this end the Henry Court reasoned the territorial statutes were in "no way the equivalent of statutes punishing libel, perjury, forgery and the like." State v. Henry, 302 Or. at 522, 732 P.2d at 16. Thus, the Henry Court concluded "obscenity" was expression that could not be restricted because it did not wholly fall within any historical exception. A similar result follows for ORS 9.160.

Beyond any doubt, ORS 9.160 cannot be wholly confined within some historical exception that was well established when the early American guarantees of freedom of expression were adopted, i.e., by the late eighteenth and mid-nineteenth centuries. Conclusively, the Oregon unauthorized practice of law statute was not enacted until the Great Depression era when similar statutes flourished across the country and state bar associations began to vigorously enforce these statutes against nonlawyers.

Neither is ORS 9.160 a modern version of some historical exception. ORS 9.160 is plainly an absolute ban on a type of speech that no antecedent governmental enactment had ever concerned itself with: The out of court exchange of legal advice between nonlawyers. The American Bar Association Commission on Nonlawyer Practice in Nonlawyer Activity in Law-Related Situations, has detailed these historical

circumstances. It reports:

> Despite the number of distinguished lawyers who appeared on the scene in the years after the revolution, the first 100 years of the new American nation were marked by an unregulated legal profession. During this period virtually all colonial era restrictions on admission to practice were removed. ... In the 19 new states admitted to the union between independence and 1860, the earliest colonial era model of an untrained and unregulated bar -- even for appearances in court --was replicated.

The report continues:

> In the mid-nineteenth century, the era of expansion to the unsettled west began and marked the rise of "Jacksonian democracy" that scorned class privilege and encouraged ordinary people to assume all the responsibilities, including representation in legal matters, that they thought appropriate. This further encouraged the practice of law by all persons without regard to educational or other qualifications. (citations omitted).

The American Bar Association Commission on Nonlawyer Practice, Nonlawyer Activity in Law-Related Situations, (1995), pgs. 19-20.

Consistent with this historical version, the Oregon Supreme Court in State v. Henry, concluded in the context of determining whether obscenity had been well established as a conventional crime that:

> [W]e perceive that most members of the Constitutional convention of 1857 were rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others.

State v. Henry, 302 Or. at 523, 732 P.2d at 16.

Absent any well established historical basis for an absolute ban on the free exchange of legal advice between nonlawyers, the party defending ORS 9.160 is unable to except

it from the broad sweep of Art. I, sec. 8. The unauthorized practice of law statute is plainly a twentieth century governmental enactment without any historical precedent aimed at banning communication between nonlawyers on a certain subject, and therefore it violates Oregon's constitutional guarantee of free expression. But more than a syllogistic exercise, this analysis reveals the vital principles central to a coherent understanding of Art. I, sec. 8.

In Oregon, because communication on any subject is constitutionally privileged unless there is an historical exception, speech can only be regulated incidentally by laws which proscribe some real and objectively harmful effect likely to follow from certain words at the time and place they are uttered. City of Portland v. Tidyman, 306 Or. at 188, 759 P.2d at 249. The role of this requirement is to prevent the enactment of governmental restraints on speech based on generalized presumptions and apprehensions that may not be later challenged. City of Portland v. Tidyman. 306 Or. at 189, 759 P.2d at 250 (referring to Communist Party v Control Board, 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961) where the extensive legislative findings of a statute about a "world Communist movement" could not be challenged). ORS 9.160 is plainly a governmental restraint on speech that does not specify the harmful effect objectively likely to follow from the exchange of legal advice between nonlawyers, and to the extent the court reads into the statute a harmful effect it is

designed to prevent, the prohibition still fails to satisfy the well settled constitutional requirements in Oregon for permissible restraints on the secondary effects of speech.

There are only two categories of permissible governmental enactments that incidentally may restrain speech under Art. I, sec. 8, other than those which are historically excepted, in Oregon. The first category contains those governmental enactments addressing some completed abuse of expression. See generally, Robertson, 649 P.2d at 579 (coercing another into undesired conduct a prescribable secondary effect, statute voided for overbreadth); State v. Moyle, 705 P.2d at 745 (alarming another person by threats); State v. Ray, 302 Or. 595, 599, 733 P.2d 28, 30 (1987) (words causing psychic injury had prescribable secondary effect, statute voided for overbreadth); State v. Garcias, 296 Or. 688, 679 P.2d 1354, 1358 (1984) ("...state may forbid actually placing another in fear of imminent serious physical injury... "). The idea is that the secondary effects of certain words may be proscribed, even though the words alone cannot be banned. Clearly, ORS 9.160 does not fit within this category because it is an absolute ban on the exchange of legal advice between nonlawyers, whether it causes harmful effects or not.

Neither can the absolute ban of ORS 9.160 be saved by recasting it as a necessary prior restraint to avoid some future harmful effect of speech. In Oregon, the only permissible prior restraints are those that have been narrowly

interpreted to limit the speech of a public official where it is objectively and highly likely his speech is actually incompatible with his official function.

Thus, this second category contains those governmental enactments restraining the free expression of public officials, not where an abuse has already occurred causing a harmful effect, but where an abuse is serious and imminent enough such that the public official's speech is actually incompatible with his required function and the enactment does not absolutely ban his privileged expression. See generally, In Re Conduct of Lasswell, 296 Or. 121, 673 P.2d 855, 857 (1983) (disciplinary rule prohibiting certain communications by prosecutor upheld where in a specific case his extra judicial comments relating to the case were highly likely to be actually incompatible with his official function to preserve the conditions of a constitutionally required fair trial); Cooper v. Eugene School District, 301 Or. 358, 377-78, 723 P.2d 298, 311 (1986) (statute upheld prohibiting teacher, only when in contact with students, from wearing clothes that communicated adherence to a particular religion, on the basis it was highly likely the secondary effect of her expression was actually incompatible with her official function to facilitate the constitutional guarantee of nonsectarian state education); In Re Schenck 318 Or. 402, 431, 870 P.2d 185, 203 (1994) (judicial canons upheld that were basis for disciplining judge for publishing a letter and editorial whose

secondary effect was highly likely to be actually incompatible with his official function of impartiality on a specific case); cf, Oregon State Police Ass'n. v. State, 308 Or. 531, 536, 783 P.2d 7, 9 (1989) (absolute ban on any political activity or speech except voting of police officers not upheld). ORS 9.160 in no way fits within this second category.

The unauthorized practice of law statute does not fall within the second category because it is an absolute ban on every private nonlawyer citizen of Oregon from freely exchanging information on the subject of legal advice. Private nonlawyer citizens of Oregon simply have no official function with which their speech is actually incompatible. Public officials though. may typicallv have duties of constitutional significance with which their exercise of free speech may be objectively incompatible. No such dilemma exists for private nonlawyer citizens.

To summarize, ORS 9.160 is a governmental enactment absolutely banning the free exchange of legal advice between nonlawyers that does not specify any harmful secondary effect of the entire subject it prohibits. Further, the unauthorized practice of law statute cannot be justified as a necessary prior restraint where the Oregon Supreme Court has narrowly limited this category to the partial restraint on speech of public officials that is objectively and highly likely to be actually incompatible with their official duties of

constitutional significance.

ORS 9.160 reflects nothing more, without historical antecedent, than a generalized governmental apprehension of the free exchange of legal advice between nonlawyers. The very fact that the government may deem it desirable makes it just the type of governmental enactment Art. I, sec. 8, was drafted to prevent. As the Oregon Supreme Court said in City of Hillsboro v. Purcell:

> With regard to prohibitions on speech or writing before some completed abuse of these rights, we have held that government, with few historical exceptions, cannot prohibit speech outright by making it a crime.

City of Hillsboro v. Purcell, 306 Or. 547, 553, 761 P.2d 510, 513 (1988).

The Robertson Court stated this core principle in the following way:

> [Article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. ... [L]aws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end.

Robertson, 649 P.2d at 579.

To conclude otherwise, that ORS 9.160 is constitutional, would be to permit the government to define the harmful secondary effects of words, as the words themselves. This would turn Art. I, sec. 8, inside out. This isn't to say however, that the government is foreclosed from providing a

compensatory rather than prohibitory remedy for injuries to "person, property, or reputation," by "abuse of rights under Art. I, sec. 8. State v. Ray 302 Or. at 602, 733 P.2d at 28

(J. Linde, concurring); see also, Wheeler v. Green, 286 Or. 99, 593 P.2d 777, 788 (1979) ("be responsible for abuse of this right" refers to civil remedies for injuries to another).

In conclusion, the Oregon Supreme Court has repeatedly and soundly rejected reasoning which would permit the unauthorized practice of law statute to survive a challenge under Art I, sec. 8 of the Oregon State Constitution.

B. THE INJUNCTION IS UNCONSTITUTIONALLY OVERBROAD

The Oregon legislature has limited certain forms of legal advice and law practice to licensed attorneys. However, as shown below, it has authorized nonlawyers to engage in myriad other forms of law practice. As shown above, to the extent that the state has attempted to apply its proscriptions to out of court legal advice, it has unconstitutionally proscribed historically protected speech. However, even if, arguendo, the Oregon Constitution permitted such proscription, the injunction would still be invalid in that its reach is unconstitutionally overbroad. The trial court's injunction banned Ms. Smith from all law practice including all forms of federal and state sanctioned nonlawyer law practice. In doing so, the trial court's injunction order violates Ms. Smith's rights to free speech and association guaranteed by the First

and Fourteenth Amendments to the United States Constitution,[2] as well as by the Oregon Constitution.

In some cases, the Oregon legislature has expressly authorized nonlawyers to engage in legal practice; in others it has done so by necessary implication. The legislature's implicit authorization extends to the numerous state agencies that hold administrative hearings in which nonlawyers are permitted by regulation to practice law. The legislature's implicit authorization further extends to nonlawyer practice within such agencies, e.g. personnel specialists advising on personnel rights and obligations, Equal Employment Opportunity specialists advising on complaints of racial or sexual discrimination, etc. Further, the legislature has implicitly authorized the practice of law in those unlicensed professions and vocations in which the sharing of advice having legal consequences is an inevitable daily practice, e.g., bankers, tax advisors, personnel professionals, car dealers, etc.

2 The relevant text of these amendments is:

> Amendment I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Amendment XIV, Section 1: ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The instances of express legislative authorization of nonlawyer law practice are numerous. Oregon citizens may assist one another in advising and preparing writs of habeas corpus (one of the most complex areas of the law). ORS

34.340 Nonlawyers may represent persons in justice of peace courts in both criminal and civil legal matters. ORS 52.060. Nonlawyers may practice law by serving as justices of the peace. ORS 51.240. The Oregon legislature has authorized municipalities to permit nonlawyer representation in municipal courts. Subject to consent of the court, nonlawyers have been authorized by the Oregon legislature to represent parties in small claims court. ORS 48.415(4). Nonlawyers may represent parties before a district judge when functioning as a justice of the peace. ORS 52.060. Nonlawyers can represent others in certain aspects of workmen's compensation proceedings. ORS 656. 283(10)(6)(A); ORS 656.291(5)(6). Nonlawyers may practice law under certain circumstances in the rental and management of real estate. ORS 696.030(c), (g), (k), ff. The legislature has authorized nonlawyers to practice law in collecting claims for others. ORS 697.021(6)(2). The practice of law is authorized before the Children's Service Division, the Vocational Rehabilitation Division, the Employment Department, the Adult and Family Services Division, the Insurance Division, the OSHA Division, the Construction Contract Board, and other agencies. Where representation is authorized, the free exchange of legal advice between

nonlawyers on myriad legal, procedural, and evidentiary issues relating to such authorized practice is by necessary implication also authorized.

In addition to the above noninclusive examples of law practice authorized by the state, the United States has authorized nonlawyer citizens of Oregon to freely advise and represent one another in many areas of federal law, e.g., federal administrative agency practice, bankruptcy practice, federal personnel actions, federal employee union grievances, etc.

In Short, while certain areas of law practice are proscribed, large areas of nonlawyer law practice are state and federally sanctioned. Yet the trial court's injunction prospectively bans Ms. Smith and her company from all forms of law practice, whether authorized or not. State and federally sanctioned legal advice is educational speech and cannot be banned absent a compelling state interest and means narrowly tailored to further the state's interest while protecting the speakers right to speak freely. Board of Trustees, State University of N.Y. v. Fox, 492 U.S. 469, 482 (1989). That the state has no compelling interest in banning speech which its legislature has expressly authorized its citizens to engage in without regard to qualifications is beyond argument. An injunction that sweeps within its ban not only speech the state has proscribed but speech the state and the federal government affirmatively sanction is an unconstitutionally

overbroad injunction. Nor can the injunction's overbreadth be cured with a narrowing interpretation.

There is an enormous amount of legal advice being spoken everyday in numerous unlicensed professions and vocations. A car dealer advises a potential customer as to warranty or rescission rights. A personnel specialist advises an employee as to federally mandated equal employment requirements; a father advises a son calling from the police station of his right to remain silent. The State of Oregon, in curing any potential vagueness in the meaning of the term "practice of law," by defining it as any legal advice on any matter, has created a vagueness problem as to which forms of legal advice are authorized and which forms are unauthorized. Given the inability of anyone to know which advice in Oregon 15 proscribed and which is authorized, the trial court's injunction is unconstitutionally overbroad as it reads and is not subject to a clear narrowing which would cure its overbreadth.

Conclusion

For the reasons set forth, Defendant/Appellant respectfully request that the conclusions of law below be reversed and the injunction vacated.

Respectfully Submitted,

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CERTIFICATE OF SERVICE OF TRUE COPY

I hereby certify that I caused to be served two copies of the foregoing APPELLANTS' BRIEF on the following attorney on 12 March 1996 by mailing to attorney's office a true copy thereof and contained in a sealed envelope, with correct postage, addressed to said attorney at his last known address as shown below.

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*s/*_____
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PETITION FOR WRIT OF CERTIORARI

Appendix H

I didn't go back -- I think that case is from '62. In any event, the case is there. Somebody, at some point in time, has got to define this. If they don't do this, if it's not the legislature, if it's not the judicial arm, then people like my client are going to continue to not know, what are the guidelines? Where do you step over the line?

And, significantly, what's happening and hat's happened in this case, based on the evidence, is that there has been a fundamental violation of at least the commercial right to speech under both constitutions. And I think that the statute, on its face, the statute that the Bar is enforcing or seeking to enforce pursuant to its grant of that power through the legislature, is facially defective. It's unconstitutional. It's consistent with -- Maybe I'm dovetailing these two arguments, because they go together. It's the due process argument, as I said, under both the federal and state constitutions.

When you take a look at those, we're dealing with fundamental rights, we're dealing with the right to speech, we're dealing with the right to earn property, under respective portions of the

amendment. And this statute is so broad, with no]ldefinition, it's so broad, it provides no guidance.

I would ask the Court to take judicial notice of the current definition of the Unlawful practice of Law Committee rules, as promulgated by the plaintiff, the Oregon State Bar.

MR. REEL: Your Honor, I would object to him Referring to something that is not yet in evidence. le's arguing affirmative defenses, as I understand it, so I would object to him referring --THE COURT: I think he's got a point. I think you can refer to it in your argument, but I can't take judicial notice of it, unless we get past our motions.

MR. ABBOTT: All right, Your Honor. The point I will argue, and then if I don't survive the motions, I will put into evidence, is that the Bar hasn't defined it; or if they did, the plaintiff hasn't proved it. We know the legislature hasn't defined it and we know, in fact, the Court hasn't defined it, the "it" being "What is the practice of law?"

The problem with that is it's obvious, from what people have -- from what testimony you've heard to date, is that there are, in fact, kits out there

that people can buy. From the evidence you've heard to date, we know there is at least one lawyer in the state of Oregon who has a side business selling kits, selling it to customers -- I assume she would use a word like that, referring to Miss Elliott -- but in any event, selling that kind of do-it-yourself information to third parties.

The problem is: What is the practice of law? And I think the statute is overly broad, and it fails because it encompasses and sweeps in First Amendment rights. And for both those reasons, we would move the Court for a directed verdict.

THE COURT: Mr. Reel?

MR. REEL: Your Honor, our trial memo, I think, addresses this very well. And I don't want to repeat the whole thing, but the Court, the Supreme Court, has clearly stated what the unauthorized practice of law is; and it says you can't have personal contact with a customer if it's in the nature of consulting, explaining, recommending, or advising. You can't have contact and discussion with customers if it's in the nature of assistance in selecting particular forms. You can't have personal contact and discussion with customers if it's in the nature of filling out any part of the forms or

suggesting or advising how the forms should be used in solving the particular customer's -- in that case, marital problems.

And they said that to do so is the unlawful practice of law and must be strictly enjoined. That's the Gilchrist case. It's been followed -- It was announced in 1975, and it's been followed for 20 years.

The most recent appellate decision, I believe, was State ex rel Frohnmeyer v Consumer Sounding Board, which held that when a person gives procedural and substantive advice on legal issues or advises them how to fill out forms, they have engaged in the practice of law.

THE COURT: The point that Counsel was making, I think, that -- actually, his second point, a point he should have made, I'll put it. Even if the Supreme Court has written all this wonderful, clear language, how does that help us when we're dealing with the statute?

MR. REEL: Because the law is that Courts may look to custom, practice, and appellate court decisions in defining the terms of statutes. And, particularly, there is a direct holding in the state of Washington that their statute, which is virtually

the same as ours, does not define unlawful practice of law, is constitutional, and was upheld in the Hunt case, I believe it was. I can find it in my memo. And they said, "We can specifically refer to court decisions." Their Supreme Court had defined it.

In addition to that, we have the Oregon Supreme Court, in one of the Wright decisions that I cited, directly saying that the practice of law, the statute is not unconstitutionally vague as applied to the facts of the Wright case. And we have the Ninth Circuit upholding a U.S. District Court of Oregon decision that this statute, 9.160, is not unconstitutionally vague. So if this Court were to make a different ruling, it would not be following those higher court decisions. I don't know what else can be said.

MR. ABBOTT: Can I just respond real briefly, Your Honor?

THE COURT: You can.

MR. ABBOTT: Obviously, the Court has read the trial memos, and I'm not going to reincorporate that. The only comment I want to make is to underscore -- hopefully we made the point in our memoranda -- that in the Wright decision, he admitted, the party being sued, that he was engaged

in the unauthorized practice of law, and he said that the statute was unconstitutional. That's fundamentally different than the scenario in this case.

Thank you.

THE COURT: The difficulty that you get into in certain situations, whether you're the legislature or whether you're the Supreme Court or you're the Ninth Circuit or you're the Court of Appeals or you're a Circuit Court judge, is there are those things -- and the one that we all hear about is pornography -- that you know it when you see it, but you can't put it in words. And brighter people than I have had that particular problem. The practice of law, like pornography, has that same kind of problem, especially when you get out towards the periphery.

Our Oregon Supreme Court has, in fact, made it clear that the practice of law in the state of Oregon, that that phrase includes -- and, again, this is just quoting from the Gilchrist case -- includes "all personal contact . . . in the nature of consultation, explanation, recommendation or advice or other assistance in selecting particular forms, in filling out any part of the forms, or suggesting or

advising how the forms should be used in solving the particular customer's marital problems does constitute the practice of law and must be and is strictly enjoined."

And, clearly, some of the testimony in this case has come within that interpreted proscription. And, hence, while on the periphery you may have a vagueness sort of problem and there are aspects of the testimony in this case that are well within any part of the phrase that may be vague, I'm going to deny the motion.

PETITION FOR WRIT OF CERTIORARI

Appendix I

NON LAWYER ACTIVITY IN LAW RELATED SITUATIONS

REPORT WITH RECOMMENDATIONS

AMERICAN BAR ASSOCIATION
COMMISSION ON NON LAWYER PRACTICE

August 1995

Executive Summary

The Commission's report, *NonLawyer Activity in Law-Related Situations*, is based on the statements of nearly 400 witnesses and the information contained in more than 2,000 documents gathered during the course of the Commission's deliberations and ten hearings held in 1992,1993 and 1994 Part One of the Report details the findings of the Commission. Part Two sets forth the Commission's analysis, conclusions and recommendations.

PART ONE; FINDINGS

A. The History of Nonlawyor Delivery of Legal and Law-Related Services

From the founding of the colonies until today, nonlawyers have participated with lawyers in the giving of advice and assistance to others on matters involving the law The role of nonlawyers in the process waxed and waned until the eve of the 20th century. Then, in a span of about 70 years, requirements for admission to practice law became more rigorous and laws prohibiting the unauthorized practice of law (UPL) were enacted. The 1930s began several decades of aggressive enforcement of UPL laws. The last 20 years have seen a gradual decline of enforcement, although increased activity by prosecutors or state bar UPL committees has occurred in several jurisdictions in the last few years.

B. Nonlawyer Activilies in specific Legal and Law-Related Maffers

Today, individuals often choose to act on their own behalf without the assistance of a lawyer in situations that involve the law, even when those situations involve appearances before courts or administrative tribunals. Self-representation is particularly common in day-to-day business and personal interactions, in family courts, in tribunals hearing traffic, housing, estate and small claims matters, and in many state and federal administrative proceedings. Among reasons for self-representation given by those appearing before the Commission were the expected cost of hiring a lawyer, the perceived simplicity of a matter, the desire to act independence, and frequency, problems of communication with lawyers.

People who choose to represent themselves obtain needed information from many sources other than lawyers, ranging from neighbors, friends and the media, to religious advisors, teachers, co-workers, counselors and computer networks. A significant development is the proliferation of self-help books and computer software programs related to a vast range of law-related situations, many of which provide ready-to-use legal forms accompanied by instructions

on their preparation and use. This new frontier of self-help materials draws on increasingly available and accepted technology: software programs guide individuals in the preparation of legal forms; e-mail networks make quick exchanges of information easier; and a few courts even make computer-generated forms available within the courthouse.

Some self-representing individuals are not skilled in the use of computers, or even typewriters; others do not speak or read English. For such persons, document preparers copy handwritten documents, type dictated information into forms, or translate responses from a person's native language into English. As long as document preparers give no legal advice (even advice as to which form to use) their services are almost always held not to violate statutes prohibiting the unauthorized practice of law

The Commission found that an extensive array of federal and state administrative agencies allow nonlawyers to provide advice to self-representing persons and even to represent parties in agency proceedings. Examples of federal agencies that allow nonlawyer practice include the Internal Revenue Service, the Immigration and Naturalization Service, the Social Security Administration and the Patent Office. In those agencies, nonlawyers not only assist with agency paperwork and applications for agency action, but also may handle full evidentiary hearings as well. The Supreme Court of the United States has held that a federal agency's decision to allow nonlawyer practice preempts application of state UPL provisions.

Myriad instances of legal advice and representation by owners and employees of well-established businesses, as well as by employees of unions and government, are often overlooked in a review of nonlawyer activity in law-related situations. Among the businesses are tide companies, real estate brokerages, accounting firms, bank trust departments, debt collection agencies and architects. Union representatives represent workers in the automobile industry; teaching profession and a host of other labor settings in grievance hearings, arbitrations and negotiations. Government employees provide advice about the law to members of the public.

Members of community-based organizations and nonprofit charitable groups also provide advice and, sometimes, representation to group members and to low- and moderate-income individuals concerning their law-related problems. In certain instances, such as asylum assistance or advocacy on behalf of children with special educational needs, these nonlawyer advocates undertake lengthy training, use sophisticated materials and offer extremely specialized services.

Finally, the Commission found that an increasing number of other non-lawyers are offering advice and assistance to self-representing individuals or are actually representing consumers in law-related situations. The Report categorizes these nonlawyers as "legal technicians." The number of legal technicians is not known. One relatively well known example is the storefront

tax preparer. Other examples include persons offering services to individuals seeking divorces, facing evictions, applying for visas, claiming bankruptcy, and desiring wills and trusts, and persons calling themselves document preparers but offering advice about legal forms. The Commission's record contains reports of both high and low quality work by legal technicians (including some work by people described as document preparers but who were also providing advice) and some reports of actual harm to consumers.

C. The Growth of the Paralegal Profession

Paralegals, as defined in the Report, are different from legal technicians by virtue of their working with the supervision of lawyers, or at least with lawyers who are accountable for their work. The paralegal profession has grown greatly since it came into existence during the 1960s. Paralegals work in law firms, government agencies, corporate law departments, nonprofit organizations and, increasingly, on their own as freelance or contract paralegals. They often perform complex substantive tasks which would otherwise be done by lawyers. Although a lawyer is always accountable to a client for a paralegal's work, witnesses reported that many paralegals operate without meaningful supervision. An increasing number of paralegals have higher educations, and two national paralegal organizations are urging broad adoption of voluntary certification systems for paralegals. The details of their recommendations, and those of other paralegal organizations, can be found in an Appendix to the Report.

D. Nonlawyer Activity to Consumers

Authority on the specific liability to consumers of different types of nonlawyer providers of law-related services varies. For example, union representatives are not held to a lawyer's standard of care when representing union members at hearings while some legal technicians have been held to lawyers' standards. Paralegals sometimes have been held directly liable to consumers but more commonly only the lawyers with whom they work are held liable. The one area in which there is some degree of uniformity involves self-help materials. Authors and publishers of self-help materials are generally not subject to challenge under either product liability or unauthorized practice statutes.

L Recent Efforts to Examine and Regulate Nonlawyer Activities

Several states have recently examined nonlawyer activity. State legislatures have considered a wide variety of measures to regulate legal technicians.[10] Reports from court and bar task forces in California, Arizona, Minnesota and Florida, among others, proposed more explicit or expanded roles for nonlawyers. Bar inquiries in other states, including Nevada and Nebraska, led to reports which did not recommend more explicit or expanded nonlawyer roles.[11] The thoughtfulness of the varied state task force reports bolsters the Commission's general belief that most of the issues discussed in those reports can best be addressed at the state level.

PART TWO: ANALYSIS, CONCLUSIONS AND RECOMMENDATIONS

The Commission reached three major conclusions when it analyzed the record:

10 A listing of measures considered in recent years by state legislatures is set forth in Appendix C.

Several state task force reports are described in Part One, ~ E of the Report.

Increasing access to affordable assistance in law-related situations is an urgent goal;

Protecting the public from harm from persons providing assistance in law-related situations is also an urgent goal; and

When adequate protections for the public are in place, nonlawyers have important roles to perform in providing affordable access to justice.

The most fundamental conclusion of the Commission, however, was that each state has a unique culture, a specific legal history; a distinct record of experience with nonlawyer activity and a current economic, political and social environment which will affect its approach to varied forms of nonlawyer activity. As a result, the most important conclusion of the Commission is that each state should conduct its own careflil analytical examination, under the leadership of its supreme court, to determine whether and how to regulate the varied forms of nonlawyer activity that exist or are emerging in its jurisdiction.

The information that led the Commission to these conclusions also led it to formulate six major recommendations and to identify a wide variety of actions that practicing lawyers, bar associations, courts, law schools and the federal and state governments might take. Part Two of the Commission's Report sets forth the bases for these conclusions, the recommendations they led to, and the actions that are needed to implement the recommendations.

A. Increasing the Public's Access to the justice System and to Affordable Assistance With Its Legal and Law-Related Needs is an Urgent Goal of the Legal Profession and the States.

Lawyers have a long tradition of aspiring to assure that justice is available for everyone. Standards of conduct have consistently encouraged *pro bono* and public service activities. Despite this tradition, much remains to be done before all moderate- and low-income persons will have effective access to affordable assistance with their legal and law-related needs.

Many studies identify a massive volume of unmet legal needs among low-income persons. Similar studies focusing on moderate-and middie-income individuals establish that more than sixty percent of the legal and law-related problems of that group are not brought to lawyers or courts. This widespread refusal to use the justice system can be attributed to numerous factors, not the least of which is a matter of individuals' perceptions about their problems:

either they view their problems as not serious enough to justify obtaining legal assistance; they believe that their situation does not warrant paying what they expect to be charged; or they suspect that their problem will cost more to resolve than they can afford.

The Commission heard many reasons for consumers not utilizing the services of lawyers to serve law-related needs: that lawyers are not always available at affordable rates; that for some kinds of specialized issues (for example, special education cases) few lawyers have the knowledge and experience needed; that for damage claims involving relatively low potential recoveries, the available fees may be too low for a lawyer to be able to undertake the work; that there are too few lawyers fluent in languages other than English who can handle the cases of non-English speaking clients; and that lawyers' significant debt burdens and rising operating costs put lawyers under economic pressure to

Consequently, beyond the expansion of traditional paralegal roles, more widespread approval for nonlawyer roles in state administrative agencies, and continuation of nonlawyer activity which is already lawful, the Commission recommends that the states adopt an analytical approach in assessing whether and how to regulate other varied forms of nonlawyer activity that exist or are emerging in their respective jurisdictions. The Commission further recommends that the criteria for this analysis include the risk of harm the nonlawyer activities present, whether consumers can evaluate providers' qualifications, and whether the net effect of regulating the activities will be a benefit to the public. Finally, the Commission recommends that the highest courts take the lead in examining specific activities within their jurisdictions, with the active support and participation of the bar and the public

The Commission recommends a specific analytical approach for use by the states in determining what level of regulation, if any, is appropriate. The approach will help in assessing whether a particular activity should be unregulated, regulated or prohibited. Three broad criteria are suggested:

1. Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being?

2. Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of nonlawyers offering the services?

3. Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

Regulation of a nonlawyer activity may be needed if the activity presents a serious risk, if consumers cannot protect themselves against that risk because they will find if difficult or impossible to evaluate the nonlawyer service

provider's qualifications, or if the likely benefits of regulation outweigh the likely negative consequences of regulation. The type of regulation chosen will depend upon the predicted costs and effectiveness of different options for reducing the predicted harm while avoiding counterbalancing negative consequences. The activity should be prohibited if no regulatory approach will effectively and economically achieve acceptably low levels of harm to consumers.

The first criterion involves judgments about degrees of injury. Of course there is some risk of harm in every activity. A state will need to consider how frequently a nonlawyer might make mistakes, whether those mistakes will actually cause injury, how substantial the injury will be, whether there is an effective remedy if injury occurs, and if there is any experience in other states on which to make such judgments. If there is relatively little serious risk to life, health, safety or economic well-being, regulation may not be needed.

The Fifth criterion asks whether consumers can protect themselves l,y asking provider qualifications, and will turn on whether the consumers will know what qualifications may be relevant and will be able to evaluate them. This criterion does not rely on the consumer's ability to directly assess the quality of services provided because this is very difficult to do when professional services are involved. If consumers can protect themselves, then regulation may not be needed.

The third criterion involves balancing the actual benefits likely to arise from regulation against any negative consequences of that regulation. Although regulation or prohibition of an activity can reduce the risk of harm to consumers who cannot protect themselves adequately, some levels or forms of regulation may reduce access to justice. For example, will the regulatory system cause nonlawyers to raise their prices so much that increases in access will be lost? Moreover, certain forms of regulation may not provide adequate protection. In that regard, it will be essential to identify whether the regulatory system under consideration can and will actually be enforced.

At the root of this balancing lies a difficult question which each state will have to assess. How much does the consumer's interest in having at least some assistance from a nonlawyer justify the increased risk of harm to that consumer from possibly lower quality assistance?

state' conduct assesments, they should consider a wide range of regulatory possibilities, depending upon the activity to be regulated. Among the simplest are consumer protection laws, unfair and deceptive trade practice statutes, criminal laws against fraud and the traditional remedies of actions sounding in negligence. A second group of regulatory possibilities includes design of affirmative consumer remedies, such as insurance, bonding, arbitration and mediation, or client protection fund requirements. A third approach is regulation through control of the forum, such as that found in administrative agencies, and might include prescribing forms, limiting access to the tribunal and requiring disclosure of the provider's nonlawyer status.

Finally, for certain types of activities, states will want to explore regulation by registration, certification or licensure. In this exploration, regulatory systems might include requirements related to disclosure, education, age, work experience, specialized training, recordkeeping, continuing education, compliance with ethical standards, disciplinary procedures and admission examinations. The report concludes by giving examples of how these criteria might be employed by a state in its assessment of several common situations in which nonlawyer activity has been considered. The situations vary in complexity, potential for harm and in other ways, permitting the reader to see sample application of the Commission's proposed analytical framework. These examples include the document preparer who types or otherwise completes court-approved forms or other forms, the legal technician who assists a self-representer by providing both typing services and limited advice about a "simple" divorce, a legal technician who assists in a residential real estate sale, and a battered women's shelter advocate who, functioning as a legal technician, advises and assists a client in filing a complaint, seeking police action and preparing papers for a protective order.

Conclusion

The Commission's Report amply demonstrates that nonlawyers provide services which in many instances relate to the practice of law. We believe that this report fulfills the mandate of the Commission to investigate the extent of; and the areas in which, such practice takes place. The factual findings of the Commission demonstrate that nonlawyers, both as paralegals accountable to lawyers and in other roles permitted by law, have become an important part of the delivery of legal services, and that their expertise and dedication to the system have led to improvements in public access to affordable legal services. The work of the Commission has also uncovered many inadequacies among lawyers in providing professional services which have given rise to increasing dissatisfaction with our profession by the public. The debate over delivery of law-related services and their cost is a public concern that will be debated by the public, not just by the legal profession. This Report should be viewed by the bar as an opportunity to take those steps which will protect the public and at the same time provide increased access. If this Report is to have any value, it will be in the thoughtftil consideration of it by the bar, the judiciary and the public. In the first instance, the bar must take the lead to assure that legal services are rendered in a manner which will enhance public respect for the institutions of justice.

SUMMARY OF RECOMMENDATIONS

whereas, Increasing the Public's Access to the Justice System and to Affordable Assistance With Its Legal and Law-Related Needs Is an Urgent Goal of the Legal Profession and the States; and

Whereas, The Protection of the Public from Harm Arising From Incompetent and Unethical Conduct By Persons Providing Legal or Law-Related Services Is an Urgent Goal of Both the Legal Profession and the States; and

whereas, When Adequate Protections for the Public Are in Place, Nonlawyers Have Important Roles to Perform in Providing the Public With Access to Justice;

THEREFORE, The American Bar Association Commission on Nonlawyer Practice Recommends:

1. The American Bar Association, State, Local and Specialty Bar Associations, the Practicing Bar, Courts, Law Schools, and the Federal and State Governments Should Continue to Develop and Finance New and Improved Ways to Provide Access to Justice to Help the Public Meet Its Legal and Law-Related Needs.

2. The Range of Activities of Traditional Paralegals Should Be Ex-Expanded, With Lawyers Remaining Accountable for their Activities.

3. States Should Consider Allowing Nonlawyer Representation of Individuals In State Administrative Agency Proceedings. Non-lawyer Representers Should Be Subject To the Agencies' Standards of Practice and Discipline.

4. The American Bar Association Should Examine Its Ethical Rules, Policies and Standards to Ensure that they Promote the Delivery of Affordable Competent Services and Access to Justice.

5. The Activities of Nonlawyers who Provide Assistance, Advice and Representation Authorized by Statute, Court Rule or Agency Regulation Should Be Continued, Subject to Review By the Entity Under whose Authority the Services Are Performed.

6. With Regard to the Activities of All Other Nonlawyers, States Should Adopt an Analytical Approach in Assessing whether and How To Regulate Varied Forms of Nonlawyer Activity that Exist or Are Emerging in Their Respective Jurisdictions. Criteria for this Analysis Should Include the Risk of Harm These Activities Present, whether Consumers Can Evaluate Providers' Qualifications, and whether the Net Effect of Regulating the Activities Will Be a Benefit to the Public. State Supreme Courts Should Take the Lead in Examining Specific Nonlawyer Activities Within Their Jurisdictions With the Active Support and Participation of the Bar and Public.

No._____

In The

Supreme Court of the United States

October Term, 1997

*

ROBIN SMITH,

Petitioner,

v.

OREGON STATE BAR,

Respondent.

*

Petition For Writ of Certiorari

To the Oregon Supreme Court

*

PETITION FOR WRIT OF CERTIORARI

*

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Pro se

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MR. REEL: We will do so, Your Honor. MR. ABBOTT: Second motion for directed verdict, Your Honor, goes to one of our affirmative defenses. It's the freedom of speech issues that we've raised by our affirmative defense, both under the United States Constitution and under the First Amendment. And this will sort of dovetail into due process of defense, that I'm also going to raise as a motion for directed verdict, likewise under both the federal and state constitutions.

What we're talking about in this case, based on the plaintiff's evidence, is that there is no doubt that there is some form of commercial speech. In the aggregate litigation, at the end of the case, if there is an end of the case, if I don't prevail on these motions

THE COURT: Well, there could be an end, but it could be ending later.

MR. ABBOTT: If it ends later, if I put on evidence, if you tell me to come back on Wednesday, there is another kind of speech involved in the case that will be in our case. But based on just the plaintiff's case, it seems to me we have commercial

speech involved.

It's analogous to, although clearly different from, the Bates decision, the attorney advertisement case that the U.S. Supreme Court took on some time ago. And clearly the Supreme Court said there are safeguards available to lawyers. There are safeguards available to commercial speech, regardless of whether you're a lawyer or not. And the issue that I think comes about under this case, under 9.160 and the related enforcement statute, is whether my clients, collectively, whether their right to freedom of speech has been infringed upon because, in effect, we don't know what the practice of law is. What we have is an undefined phrase. What we have is the Oregon Supreme Court, through a series of cases -- and if your Your Honor has read them now --THE COURT: Twice now. MR. ABBOTT: -- basically saying, "We don't need to decide them," just that "In this particular case, this is" or "This isn't" or "This did" or "This didn't cross the boundaries." And that's it. That's what the Supreme Court has done. What it's constantly done is refused to, for whatever reason, or chosen not to define the practice of law. Clearly

the legislature hasn't done that.

When I was back reading the cases again, it as the Security Escrows case, I believe Let me double check that. Yes, it was. If you go back and reread the Securities Escrow case, there is a dissenting opinion by Justice O'Connell. I forget if e was chief justice at the time or just a justice.

THE COURT: But in any event, he was the smartest one. I worked for him, so I think that he as the smartest one.

MR. ABBOTT: I and Mr. Reel both worked for Judge Tongue.

THE COURT: He used more words.

MR. ABBOTT: He did do that, but he is a very fine man and I think very highly of him, as I'm sure my colleagues do. But his reasoning, as you may recall -- and Justice Sloan joined in is that this is a situation where the legislature ought to be defining it. He disagreed with the majority. He thought they should have come to a different conclusion. But he believes that the Court does not have the inherent authority or power to reach that ultimate resolution. It's a legislative question. It seems to me that Justice O'Connell's reasoning is right.

the role of the court in defining the practice of law was expressed by the Florida Supreme Court in a 1980 case upholding a Florida statute that permitted non-lawyer representation before Florida's workers' compensation board. The Florida court held that the legislature has concurrent power with the court to define the practice of law and can pass laws "in aid of the judiciary."[65]

The Commission heard testimony that in southern New Jersey, it was wide-spread practice for realtors and tide companies to handle all aspects of residential real estate transactions where neither the seller nor buyer was represented by legal counsel, while in northern New Jersey such activity was handled only by lawyers. The UPL Committee of the New Jersey State Bar considered the South Jersey practice to be the unauthorized practice of law. Shortly before the publication of the Commission's report) the New Jersey Supreme Court resolved the issue and unanimously held that the nonlawyer practice of handling residential real estate closings without the involvement of legal counsel does not constitute the unauthorized practice of law so long as brokers and tide officers conform to specific conditions, including advising buyers and sellers of the general risk involved in not being represented by attorneys.~

The overbreadth of many UPL laws and the vagueness of their definitions soon elicited criticism from both business and academia. For example, then Har'~d Law School Dean, the late Erwin N. Griswold, while spealting before the Section on Taxation of the ABA in *1955* about the desire of accountants to expand their activities into areas thought by many lawyers to be the practice of law, said:

> The problem is often put in terms of "practice of law" Only lawyers can "practice law," it is said, and if what an accountant is doing is "practice of Law," then he is acting improperly.

65 The Florida Bar V. Moses, 380 So.2d 412 (Fla. 1980). Courts differ on whether they have inherent power to regulate law-related activities by nonlawyers which are conducted outside of courts, they share power with legislatures, or whether their decisions are subordinate to legislative will. See *generally* Marlene Remmert, *Note: Representation of Clients Before Administrative Agencies: Authorized or Unauthorized Practice of Law?* 15 VALPARAISO L.REv. 568 (1981). *See also* discussion *infra* Part One, § B3.6 In re Opinion No.26 of the Committee on the Unauthorized Practice of Law, *654* A.2d 1344 (NJ. 1995) *(per curiam)*. The NewJersey Supreme Court held that the prohibition against the unauthorized practice of law serves to protect the public against unskilled advice but that the prohibition is not automatic. The most important

question, the court held, is whether the public interest is disserved by permitting the conduct, and that determination must be based on practical considerations and common sense, using a complete and detailed record that includes the extent, length of existence, effect and result of the performance by nonattorneys of the activity in question and a showing of the public need for such nonlawyer activity~ The court then found that the record before it showed that the nonlawyer activity at issue had been conducted "without any demonstrable harm to sellers or buyers, that it apparently saves money, and that those who participate in it do so of their own free will presumably with some knowledge of the risk *Id* at 1359. The court determined that the public interest is sufficiently served if advance written notice is given parties of their right to retain counsel and the risk of not doing so. Finally, the court stated, while "[w] e firmly believe the parties *should* retain counsel.... We decide only that the public interest does not require that the protection of counsel be forced upon the parties against their Will." *Id* at 1360.

I feel fairly sure myself that this is not a sound way to approach the problem. The trouble is that it really begs the question. If we start with that approach, then the conclusion is going to follow as surely as the night follows the day that much of what the accountants have long and customarily done is improper for them to do. The people who think in terms of "practicing law"-and this includes many of those who have been active on unauthorized practice committees~proceed from that major premise to a minor premise that if the problem involves a matter of law, such as the application of a statute or regulation or court decision, then it is practice of law" and can only be done by a lawyer. But this is surely too broad.... Obviously, there are many things involving the law and its application which can and must be done by non-lawyers. The "practice of law" is not a safe and sound approach, it seems to me, if it is taken to include a rule that any matter involving application of statutes, regulations and court decisions can only be handled by a lawyer.

It would be my own view, for what it is worth, that this is the error into which the trial court has fallen, to some extent, in the well known *[Agran]* case. The court has taken a too literal, or semantic, view of the concept of "practice of law," and has not recognized that there are many things that lawyers do which are properly also done by others. The concept of "practice of law" cannot be as exclusive as it sounds when it is put in those terms. There is a very considerable overlap at the edges, and injustice is done if that overlap is not recognized.[67]

Even though courts have found it difficult to arrive at a generally acceptable definition of the practice of law, the bar at one time found another method of defining the boundaries that could not be crossed by nonlawyers. By negotiating agreements with associations representing other professions, it was possible to lessen the friction that was created through the enforcement of UPL byjudicial or quasi-judicial means. Some of the first agreements were negotiated at a local level in the mid-i 9[2]0s while national agreements, known as "statements of principles," were negotiated by the ABA beginning in the early 193Os.~

The ABA statements of principles were negotiated by "national conference groups" formed to bring together lawyers and representatives of other professional groups with which there was the possibility of conflict with UPL prohibitions. The primary written product of the conference groups were the statements of principles that were intended to govern the interaction between clients, lawyers and the members of the subject nonlawyer profession. The statements were meant to clearly establish what constituted the practice of law

67 Erwin N. Griswold, *A Further look: lawyers and Accountants, 41* A.B.A J. 1113, 1114 (1955). Dean Griswold's remarks, delivered at the 1955 ABA Annual Meeting in Philadelphia, were reprinted as an article in the *ABA Journal* The case cited in the quoted passage is Agran v. Shapiro, *supra* note 62.

68 Christensen, *supra* note 12, at 195-96. The texts of the various Statements ofPrinciples were published in the corresponding year's volume of the *Marnnaa~-Hubhdl Law Directoiy. Id* at 211.

and what did not in a particular professional area of interest. The first ABA agreement of this kind was written in cooperation with the American Bankers Association in 1933. The conference groups were given formal status when the ABA structure was reorganized in 1936.

Over the years, the conference groups included, among others, such varied service providers as accountants, architects, the insurance industry, collection agencies, real estate tide companies and social workers. Although several of the conference groups presently continue to perform the flinction of facilitating communication between lawyers and professional groups with similar substantive interests, there was a movement in the late 1970s and early 1980s to change the character of the Association's UPL activities. By 1982, the ABA House of Delegates had rescinded all of the 28 statements of principles that had once been in effect.[69]

69 *See James* Podgers, *Statements ofPrincipl's: Are Th~ on the Way Out?, 66* A.B.A J. 129-130 (1980) (describing the bar's declining interest in maintaining agreements with other professions). Some of the conference groups continued after 1982 to submit reports to the Standing Committee on National Conference Groups, which was established in August 1970, restructured in 1980, and finally disbanded in 1994. At the ABA Annual Meeting in 1994, three National Conferences were continued as freestanding entities: National Conference of Lawyers and Certified Public Accountants, National Conference of Lawyers and Corporate Fiduciaries and National Conference on Lawyers and Representatives of the Media.

not always require lawyers; and nonlawyer providers have promoted their services in both traditional and new arenas.[442]

Many who appeared before the Commission agreed that lawyers are ordinarily essential for competent representation before tribunals that have formal evidentiary rules and involve complex matters. In any forum, the representation of group rights, the prosecution of test cases, and law reform advocacy almost always require the special skills of lawyers. At the other extreme, while lawyers can assist retired persons in applying for social security benefits, these applications do not ordinarily require a lawyer's skill.~ Of course there may be circumstances where it would be important to have a lawyer for any matter, even for a social security application. The seemingly routine social security application may be denied or there may be a dispute over what the benefits should be, and appeals may be required all the way through federal court. Notwithstanding this possibility, most Americans do not hire lawyers when they apply for social security~ In between are numerous circumstances when a lawyer's services may or may not be essential to the competent handling of the matters.

3. NONLAWYERS HAVE IMPORTANT ROLES TO PERFORM

The Commission has concluded that nonlawyers who provide services already authorized by law perform important roles. It recommends, therefore, that the activities of nonlawyers who provide assistance, advice and representation authorized by statute, court rule or agency regulation should be continued, subject to review by the entity under whose authority the services are performed.

The Commission's record shows that many people are unaware of the extensive role nonlawyers already occupy in our legal system.~ The extent and type of nonlawyer activity varies widely among the states because each state has developed its own, locally focused, methods to meet citizens' needs, deploying nonlawyers in many different ways.

Part One of our Report describes many types of important and authorized nonlawyer activities. For example, as previously discussed, the traditional paralegal has ever increasing importance and may be able to play an even larger role in the fliture. Similarly, we have also noted that nonlawyers have an important role to play in helping people with many kinds of administrative agency problems. In particular, the Commission received extensive information

about the high quality of services provided by nonlawyers employed by religious and sec-

442 The Florida Bar Special Committee on Non-Lawyer Practice noted:

In addition to the economic principles discussed above [affordability of lawyers' services] it also appears that many people simply prefer to use non-lawyers for routine legal services even if comparable services [are] available by lawyers at a competitive price. THE FLORIDA ~ REPORT OF THE SPECIAL COMMITTEE ON NONLA~~R PRACTICE, *supra* note 82, at 6.

~ *See* opinions of Justices Douglas and Rehnquist, *supra* notes 394 and 395.

444 Many of these roles are discussed earlier in Part One, ~ B2-5. Performance of those roles often involves giving advice on legal matters.

ular nonprofit agencies. One important example is in the immigration area where nonlawyers assist immigrants and refugees, many of whom would otherwise be unrepresented.

Compelling testimony disclosed that in some instances even grassroots mutual support assistance has been effective and has met needs not served by the practicing bar.~[44]~ Some state bar task forces examining nonlawyer activities in their states also concluded that some document preparers and legal technicians are competently and adequately assisting self-represented persons who are not served by the bar.[446]

Although there are many circumstances in which a lawyer's services are essential, or at least advisable, the Commission's record establishes that non-lawyers also have important roles to play and that their assistance enhances the justice system. Further, performance of these roles necessarily entails the giving of some legal advice. It is exceedingly difficult to draw a bright line to determine circumstances when a lawyer's skills are essential.~[7]~ Many business people and other professionals handle matters that inevitably involve the law, and they give advice about that law. As former Harvard Law School Dean Erwin Griswold noted in 1955, "obviously there are many things involving the law and its application which can and must be done by nonlawyers."[448] In 1969, the ABA and the American Institute of Certified

Public Accountants jointly acknowledged this f~ct in a statement of principle which was in effect at the tirne, stating:

> In our complex society; the average citizen conducting a business is confronted with a myriad of governmental laws and regulations which cover every phase of human endeavor and raise intricate and perplexing problems. These are flirther complicated b/ the tax incidents attendant upon all business transactions. As a result, citizens in increasing numbers have sought the professional services of lawyers and certified public accountants....Frequently the legal and accounting phases are so interrelated and interdependent and overlapping that they are difficult to distinguish. Particularly is this true in the field of income taxation where questions of law and accounting have sometimes been inextricably intermingled.[449]

See discussion of nonlawyer assistance to handicapped children and battered women, *supra* Part One, § B4b.

446 *See* Part One, ~ E for a discussion of some recent task force reports reviewed by the Commission during its deliberations.

~ *See generally* Rhode, *supra* note 71.

448 Griswold, *supra* note 67, at 1114. *See aAo* Morrison, *supra* note 103. *See aLso* ABA, "...IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE RE~DLING OF LAw~R PROFESSIONALISM, *supra* note 1, at 301, which concluded:

> [I]t can no longer be claimed that lawyers have the exclusive possession of the esoteric knowledge required and are therefore the only ones able to advise clients on any matter concerning the law.

449 The statement was contained in a 1969 Atnerican Bar Association Statement of Principal issued jointly with the Council of Certified Public Accountants. Statements of Principles between the ABA and other professions are no longer in effect. *See supra* notes
68~9 and accompanying text.

The U.S. Supreme Court observed that drafting the specifications and claims of a patent application constitutes "one of the most difficult legal instru ments to draw with accuracy.... And upon rejection of the application, the practitioner may also assist in the preparation of amendinents.. .which fre-

quently requires written argument to establish the patentability of the claimed invention under the applicable rules of law and in light of the prior art. "[450]

Notwithstanding the legal difficulties alluded to, the Supreme Court concluded unanimously that nonlawyers, who are subject to admission and discipline requirements of the Patent Office, can perform the activities of patent law practice as well as lawyers. The Court barred states from interfering with nonlawyer patent practice through application of unauthorized practice of law rules.[451] The Court reached this conclusion even though it recognized that the nonlawyer activity would necessarily involve the giving of legal advice, stating that patent work *"iner'itably* requires the practitioner to consider and advise his clients as to the patentability of inventions under the statutory criteria.. .as well as to consider the advisability of relying upon alternative forms of protection which may be available under state law."[452]

The history of practice before the U.S. Patent and Trademark Office is instructive. The problem of unscrupulous nonlawyer patent agents at one time had become a national scandal and led to several Patent Office reforms. The Supreme Court noted that nonlawyer agents were "[p] articularly responsible for the deceptive advertising and victimization of inventors which long plagued the Patent Office."[453] Rather than outlawing all nonlawyer patent agents, the Patent Office tailored reform toward good moral conduct requirements and required patent examinations of both lawyers and nonlawyers. The Supreme Court noted that this reform effort successftilly rooted out incompetent and unscrupulous persons without disquali~ing a whole class of persons:

So successftil have the efforts of the Patent Office been that the Office was able to inform the Hoover Commission that there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct. ~

The Patent and Trademark Office, like other agencies with highly developed regulatory systems, offers a model which is both protective of the potential client and also not unduly exclusionary as to choice of representative.

450 Sperry ~ Florida *ex reL* The Florida Bar, 373 U.S. 379, 383 (1963) (citation omitted).

451 *Id* at 404. The U.S. Patent and Trademark Office issued regulations under a 1952 federal statute allowing patent applicants to be represented by nonlawyer "agents", as well as by lawyers, at their choice. The regulations established a register for nonlawyer patent agents. The U.S. Supreme Court held that the State of Florida was preempted by federal law from interfering with the work of patent agents living in Florida, including the part of the practice in Florida that was incidental to the preparation and prosecution of patent applications before the Patent Office.

452 *Id* at 383 (emphasis added).

453 Id at 390.

454 Id at 402.

The Commission cannot anticipate the details of debate within each state about precisely where the state should draw a line between permissible and nonpermissible nonlawyer activities. Rather, the Commission's purpose is to report on the wide array of norlawyer practices it has found, to comment generally on their potential or risk in the search for solutions to people's legal and law-related problems, and to flag situations that may require prophylactic measures to prevent harm. With these purposes in mind, the concluding sections of the Commission's recommendations will discuss how a state might decide to permit, regulate or prohibit specific nonlawyer activities.

In sum, the Commission finds that the legal profession has always shared, and will continue to share, the provision of at least some of its services with nonlawyer providers, notwithstanding that most states have laws forbidding the unauthorized practice of law. Thus, in the fliture, some citizens will continue to employ lawyers for all of their legal needs, while others will not. Most people are likely to prefer lawyers for many, although not all, matters. Some citizens are likely to continue to prefer to proceed on their own without the assistance of anyone, at least in some circumstances.

Americans are independent-minded and historically value choice in purchasing services of any kind. Governmental efforts to restrict individual choice are, thus, unpopular in this country. Further, we can reasonably assume that when consumers know the pros and cons of the choices of assistance, they will make reasonable ones with which government need not unduly interfere.

The current array of approaches to federal tax preparation and advice, a law-related area that affects almost everyone, shows the range of choices that can be available:

Many citizens study the applicable tax laws and prepare their own tax returns with nothing more than the IRS Instructions.

Many others use seff-help books, and some use sophisticated sofrware that does the math, answers questions, produces filled-in forms and electronically files them.

IRS employs large numbers of noulawyers to provide tax advice which taxpayers rely upon even though IRS is not bound to honor the advice.

Nonlawyer providers also regularly assist taxpayers for fees, providing advice about tax law and preparing tax forms. Some of these providers receive

intense though relatively brief training, and work in high volume clinics that are typically located in shopping malls, store fronts and other neighborhood locations, and often employ multilingual staffi. Others operate as sole proprietorships and are not required to demonstrate any accounting or legal qualifications.

Still other nonlawyer providers are highiy trained, skilled and regulated, such as Certified Public Accountants.

Nonlawyers who become ~'Enrolled Agents" by passing an IRS examination may both prepare returns and represent taxpayers at all levels of agency proceedings, including appeals from matters handled by others. (Taxpayers can, of course, represent themselves in all such proceedings, CPAs can appear in such proceedings without becoming Enrolled

hearings, the presence and role of the nonlawyers involved is disclosed and the tribunal or agency is empowered to bar from flirther activity any nonlawyer whose conduct is inappropriate, improper or of poor quality. Establishing similar controls over nonlawyer activity in additional agencies and in tribunals is an option for states to consider.~[8]

In some circumstances, it is possible to exercise regulatory authority over the forum in which nonlawyer activity may occur rather than having to put in place direct controls over nonlawyer behavior. For example, a California judge developed and adopted specific forms for use by *pro se* litigants. The approved forms require explicit disclosure of any nonlawyer who assisted a party. The judge offers training classes for legal technicians and document preparers who have been assisting seiFrepresented persons. If forms are incorrectly prepared, the judge will prohibit the nonlawyer involved from rendering flirther assistance on such forms to be filed in the court.

Similarly, the Florida Supreme Court prescribed forms that may be used for self-representation in several types of cases. Nonlawyer assistance to a party must be disclosed. The courts in which the forms are filed bar flirther assistance by nonlawyers whose customers' forms are repeatedly in error.

Even in the absence of approved forms, a state can require that all forms filed by self-repr'ssented persons disclose whether a nonlawyer assisted in preparing the foirms. If a document preparer or legal technician makes repeated errors, a court can require the nonlawyer to take a training course or simply bar the non-lawyer from offering assistance. Court rules that regulate

nonlawyer assistance might include civil sanctions or criminal penalties for violations.

The Barrkruptcy Code amendinents of 1994 place controls upon bankruptcy petition preparers who were previously unregulated. They must sign the documents they prepare and include their social security numbers. Provisions are made for the disclosure of fee arrangements and the avoidance of fraud.~[9]

d. REGISTRATION, CERTIFICATION AND LICENSING

There are three common types of more extensive regulatory control that states may consider:[470]

Registration-a record containing a list of names. An individual would file her or his name, address and, possibly, qualifications with a government agency, and perhaps agree to be bound by certain standards, before providing services.

Certffication-registration and permission from an identified authority to use a specific occupational title based on meeting certain qualifications. The law could limit the use of the title to only those meeting the qualifications,

468 States may find it particularly attractive to consider regulation over nonlawyer activity through the forum when other states have already used that regulatory approach for the same Icinds of matters or activities.

469 Bankruptcy Reform Act of 1994, 11 U.S.C ~ 110.

470 These definitions have been derived from the general regulatory structure used by the Council on Licensure, Enforcement and Regulation (CLEAR), an affiliate organization of The Council of State Governments. *See* Shimberg and Roederer, *supra* note *463*.

such as "Certified Legal Assistant," "Certified Paralegal" or, potentially, "Certified Legal Technician." Non-certified individuals may still offer services if they do not use the occupational title.

bcensing-registration and a requirement that the nonlawyer meet formal state standards, perhaps through testing or education, to offer services. Licensing could include certification and the use of a restricted occupational title.[471] All of these regulatory approaches share the following characteristics:

identification of a state or local governmental agency with administrative responsibility;

specification of qualifications required to meet minimum standards (a list of possible qualifications appears in the following subsection of the Commission's Report);

the opportunity to enumerate standards for activity;

the possibility of exclusion from flirther activity; and

the need to identi~ sanctions for impermissible activity under the regulatory scheme and to delegate responsibility for enforcement.

Registration is the least restrictive regulatory tool. Minimally, registration pr~ duces a roster of service providers. Recently, the California legislature considered a bill requiring registration of all document preparers and legal technicians so that they could be observed by the judiciary and a consumer affiurs agency[472] Perhaps most important, a registration requirement precludes unregistered persons from engaging in the regulated activity. Registration also gives the public li~t of service proYi~cr3.

Registration can establish minimum service standards and can require proof that the nonlawyer meets basic qualifications. For example, minimum age and education requirements might be required for registration or the form could require the registrant to disclose that he or she was not a lawyer.

471 Of course, these terms are often used with far less precision in practice than they are in their definitions here. For example, "Registered" Nurses and "Certified" Public Accountants are actually engaged in licensed professions, and certification by professional associations (such as bar or legal assistant associations) may have no connection to governmental regulation by "certification." Further, a learner's permit to drive an automobile and a lawyer's privilege to practice law each involve licensure, even though the prerequisites for each are dramatically different.

Jurisdictions may encourage the voluntary registration of bicycles for the purpose of facilitating the return of lost or stolen property~ but the Commission is using the term registration in its mandatory sense as a prerequisite for offering a service.

472 *See* California Assembly Bill 1287, introduced March 3, 1993. An amended version of the bill called for the State Judicial Council and the State Department of Consumer Affairs to establish a joint task force to conduct a comprehensive study to identify all nonlawyer providers, required the participation of all nonlawyer providers and prohibited any nonparticipant from providing nonlawyer services. Assembly Bill 1287, as amended August 27, 1994 in the California Senate. The amended version of the bill did not require participation by document preparers, authors or publishers of self-help materials or by legal technicians who are authorized by federal or state law to provide legal assistance or appear before any tribunal. *Id* at § 202. On the last day of the legislative session, the bill was withdrawn by its sponsor, Gwen Moore.

Certification identifies a group of registrants as specifically qualified to provide services. Those certified can use a unique occupational title so that they can easily be distinguished from those who have not been certified.

Certification may be a valuable tool to inform the public of those qualifications or credentials considered to be appropriate for nonlawyer activities while still providing the public with a free choice of providers. Certified nonlawyers may publish their superior qualifications and even charge a higher fee. The public would be free to place its own value on certification and choose to pay or not pay any higher fee that may result.

While certification may normally imply a complete set of standards that define a high level of competency related to relevant tasks, this is not always the case. Certification standards may be simple and easily satisfied. Certification standards should reflect the required skills so the public is reasonably assured the nonlawyer can provide competent services.

Certification systems are generally more expensive than registration because they require development of competency tests. Creation of a two-tiered system of service providers naturally leads to friction at the boundary; with certified providers having a substantial stake in ensuring that uncertified individuals do not claim the restricted occupational title or undercut its marketability;

Licensure is the most complex and restrictive form of regulation. It is a process by which a government agency grants individuals formal authorization to do a specified thing upon finding that they have met certain educational and professional standards required to ensure that the public's personal and economic well-being will be reasonably well protected.

It is illegal for anyone who does not hold a valid license to hold himself or herself out as licensed to provide services for which a license is required. Nev-

ertheless, the requirements for licensure may be easily satisfied or they may be extraordinarily difficult to flilfill. The requirements for licensure can be carefilly tuned to eliminate or mitigate the harm to the public arising from a non-lawyer by demanding a demonstration of the minimal competency considered necessary by the jurisdiction to provide that service. The minimal competency may be low or high, but only those who demonstrate that they have minimal competency will be permitted to serve the public.

Licensure is generally the most expensive form of regulation to implement, since it requires competency testing, standard setting and policing of unauthorized service provision by those not licensed.

e. Requirements that might be Included In RegistratIon, Certificafion or Licensure Systems

When a state considers the more extensive regulatory systems it will also appraise what conduct, admission and retention requirements will be part of the system. The following eight requirements may be useftil to consider as states assess whether to develop new regulatory systems for nonlawyer activities. States will undoubtedly find other possibilities.

i. DISCLOSURE: Disclosure requirements may be a useful part of a regulatory scheme to avoid consumer confusion and make misrepresentation more difficult. Disclosure by nonlawyers that they are not lawyers is a simple and effective means to assist consumers in assessing service provider qualifications and the reason-

ableness of the fee. Consequently, the Commission recommends that document preparers and other nonlawyer providers of services in law-related situations should be required to openly disclose that they are not lawyers and to indicate that without the client-lawyer relationship there is no evidentiary privilege and no obligation to preserve confidentiality.

While there are innumerable possible disclosure statements, some of the more likely are the following:

I am not a lawyer.

I do not provide legal advice (or) I am not permitted to give legal advice. am not an "abogado" nor a notario publico" (lawyer). I am an epignada publica" (notary/scrivener). This and all other notices should be in both Spanish and English in any location that has Spanish-speaking clients. Similar notices in other languages can also be required.

No client-lawyer privilege exists regarding my professional relationship with you. [This should be explained to the consumer.] 473
I have no obligation to keep confidential any information you tell me, and the law places no obligation on me to keep your secrets.
My educational background or degrees are as follows:...

These and similar disclosure statements might be required to be displayed prominently in a public area in the nonlawyer's offices, stated and explained in a document presented to a customer before services ate provided and acknowledged in writing by the client. Also, a state might require that nonlawyer-prepared documents beer the nonlawyer's name and address and registration number.

ii. General Education an Age Requirements

Both minimum age and education requirements address the general maturity and sophistication of a nonlawyer, but neither is directly related to non-lawyer competency. The Commission heard a variety of testimony regarding age and education requirements, with minimum educational levels proposed that ranged from none to four years of college with some postgraduate work~

iii. ***Work Requirments***

Many who testified before the Commission recommended a work requirement related directly to the skills necessary to perform specific activities. Of course, any requirement should be reasonably related to the work to be done, and it would be inappropriate to assume that one kind of nonlawyer experience necessarily created qualifications for another kind.

In some regulatory systems, satisfaction of a work experience requirement can substitute for a minimum education requirement. Witnesses testified that many paralegals and legal technicians have years of valuable experience but may have only a high school education or less. Paralegals in legal services pro-grams, for example, often come from the communities they serve and have little formal education before working as advocates. Yet, they are often reported to be among the best advocates before administrative tribunals. Because on-

States may wish to consider whether to create a nonlawyer version of the client-lawyer privilege or the duty of confidentiality~

the-job skills training may be the most important indication of a nonlawyer's competency, a general education requirement without a work experience alternative is probably inappropriate.

liv. Specialized Training or Education Requirment

Like work experience, qualification to perform nonlawyer activities through specialized training or education should be directly related to the skills necessary to perform the activity. Different programs can be required for different types of activities. Someone qualified by the state to assist self-represented persons in small estate probate matters would not be presumed competent to represent battered spouses in proceedings to obtain a protective order against farther abuse. Similarly, a tax preparer's specialized training would have little to do with appearing in a visa matter as an accredited representative.

There is likely to be great variation in training requirements for specific services. To assist self represented persons seeking name changes, the training period might be less than a day To represent special needs children, based on one training pro gram that is already in use, training may extend for a year and indude clinical as well as classroom preparation.[474] If regulatory systems are established, the training

requirements for specific activities can be developed by working groups consisting of both legal and paralegal educators and practitioners.

Witnesses reported that most existing nonlawyer training programs are designed primarily to train traditional paralegals. The curricula in these pro-grams, like the curricula in most law schools, is designed to provide the student with a broad background in the law, research skills, an understanding of the legal system, substantive law, and other areas, but generally do not provide skill-specific training or hands~on clinical experience of the kind discussed in this section. These curricula can, however, be revised or new training programs can be designed by these educational institutions.

As already noted, there are relationships between specialized training requirements and work experience requirements; in some circumstances, regulators may conclude that satisfaction of either one of the requirements is sufficient.

V. Maintenance of Client Records Requirment

A record of the names, addresses and telephone numbers of all clients may be required. If a record is necessary it should be maintained to the fullest extent possible. Additionally, a record of the dates of services provided and a short description of the type of services provided may be required.

Vi. Continuing Education Requirment

A minimum number of hours of practice-area specific continuing legal education may be required annually. This can include in-house training, and some of the hours of the requirement may be satisfied by self-study using appropriate materials, including law school texts, audio and video taped legal training lessons, and interactive legal training software.

474 See Parent Information Center of New Jersey, Advocates' Training Program
1992-1993 Curriculum and Materials, Teaneck, N.J.

vii. ***Ethics Standards and Disciplinary Systems***

A regulatory system may include adoption of a set of rules of professional conduct and a method for enforcing those rules that includes a disciplinary procedure and sanctions such as private and public censure and expulsion from the occupational group. Many regulated professions other than the legal pro fession already adopt such regulatory systems.

Training in ethics and professional standards of practice might be required as part of a work experience requirement, a training requirement or a continuing education requirement.

vii. Examination Requirment

A skills-specific, practical examination may be required before a nonlawyer is qualified to use an occupational tide or provide law-related services. Skills examinations are designed to provide assurance of minimum qualifications. Ideally, examinations will be prepared, safeguarded, administered and revised to test all of the skills needed in the practice area.

Although not required in many other professions, periodic reexamination might be included in a regulatory system for nonlawyers. Reexamination can help to avoid the competency problems that are sometimes associated with part-time workers and to encourage the selection of relevant continuing education training of high quality.